No. 10.

Brf. of Carlisle & Sanders for P. E.

Supreme Court of the United States.

October Term, 1897.

Filed Sept. 16, 1897.

No. 10.

J. J. DOUGLAS,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

Brief for Plaintiff in Error on the Merits and on Motion to Dismiss for Want of Jurisdiction, and to Affirm as a Delay Case.

J. G. CARLISLE,
D. W. SANDERS,
AARON KOHN,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 10.

J. J. DOUGLAS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS AND ON MOTION TO DISMISS FOR WANT OF JURISDICTION, AND TO AFFIRM AS A DELAY CASE.

STATEMENT.

The defendant in error, by the attorney general, instituted this action in the Louisville law and equity court against J. J. Douglas and others under sections 480 to 487, inclusive, of the Civil Code of Kentucky, to prevent the usurpation of a franchise alleged to be exercised by plaintiff in error; to which petition Douglas filed an answer, consisting of three paragraphs.

A demurrer was filed to this answer, which the court overruled, and, the defendant in error declining to plead further, the petition was dismissed; from which judgment an appeal was prosecuted to the court of appeals of Kentucky. (See opinion of law and equity court, Record, pp. 28–65.)

On the 16th of December, 1893, the court of appeals delivered an opinion in which it was held that the contracts between the city of Frankfort and E. S. Stewart and between Stewart's executrix and Douglas were not protected against impairment by the Constitution of the United States, and the case was remanded "for further proceedings in conformity with this opinion" (Record, pp. 69–72). The case is brought here by writ of error, with supersedeas, and the following assignment of errors:

"1. The said court of appeals of Kentucky erred to the prejudice of the plaintiff in error in adjudging and directing that the judgment rendered by the Louisville law and equity court in favor of the plaintiff in error against the defendant in error should be reversed, and in adjudging against the plaintiff in error and in favor of the defendant in error the costs in the said case expended. The said erroneous and prejudicial judgment of the said court of appeals of Kentucky was rendered on the 16th day of December, 1893, and the said judgment is erroneous in that it deprives the plaintiff in error of the benefit of the contract made between him and his vendors and the city of Frankfort and the Commonwealth of Kentucky as embraced and evidenced by the acts of the legislature of Kentucky specifically mentioned in the transcript in this case and the contracts entered into by virtue thereof between the city of Frankfort and the plaintiff in error and his vendors, which are specifically mentioned and set forth in the said transcript.

"2. It was error prejudicial to the plaintiff in error and in violation of the rights secured and guaranteed to him by

section 10 of article 1 of the Constitution of the United States for the said court of appeals of Kentucky, after the passage, approval, and acceptance by the said city of Frankfort of the franchise created and conferred on the said city of Frankfort by the said acts of the General Assembly of the Commonwealth of Kentucky and the contracts duly executed by the said city of Frankfort in accordance with the provisions of the said acts of the said General Assembly therein conveying to this plaintiff in error, through his vendors, the said franchise created and conferred on said city of Frankfort by the said acts of the General Assembly of the Commonwealth of Kentucky enacted as aforesaid, and after the same had been adjudged and decreed by the said court of appeals to be valid and this plaintiff in error had acted on the faith thereof and incurred large obligations and expended and is still liable for large obligations, to adjudge that it was within the power of the Commonwealth of Kentucky, through her legislature or General Assembly, to repeal the said enactments and divest the plaintiff in error of the benefits of his contracts acquired by him thereunder, as set forth in the transcript in this case; and it was especially erroneous and prejudicial to the plaintiff in error for the said court of appeals of Kentucky to adjudge and declare that the act of the said General Assembly of the Commonwealth of Kentucky approved March 22d, 1890, was valid and not in violation of section 10 of article 1 of the Constitution of the United States and operated to deprive the plaintiff in error of the contract rights acquired by and adjudged to him as aforesaid.

"3. It was also error and prejudicial to the plaintiff in error for the said court of appeals of Kentucky (as they have done in the judgment complained of herein) to adjudge and declare in effect that section 236 of the present constitution of Kentucky, which was adopted and went into effect in the month of September, 1891, operated to divest the plaintiff in error of his contract rights acquired by him, as set forth in

the transcript of the record in this case, and in further adjudging and declaring that the said legislative and constitutional provisions were not in conflict with section 10 of article 1 of the Constitution of the United States.

"4. It was error prejudicial to the plaintiff in error for the said court of appeals of Kentucky, after having fully decided that the legislative enactments and the contracts made and executed in pursuance thereto were valid and not subject to alteration, amendment, or repeal by the General Assembly of the Commonwealth of Kentucky, as was done in the case of The Commonwealth of Kentucky *vs.* The City of Frankfort *et al.*, rendered on the 27th day of February, 1878, and in other cases, which were in full force and effect at the time the plaintiff in error made the contract in controversy and assumed the obligations therein mentioned, and on the faith of which he acted in incurring the said obligations, now to reconsider the said decision and to divest the plaintiff in error of his contract rights acquired thereunder without first making due compensation therefor."

In the petition it is alleged (Record, pp. 1–3):

"That by virtue of an act of the General Assembly entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' approved March 16, 1869, it was provided 'that the board of councilmen of said city shall have the same franchises, power and authority as are conferred upon the managers in an act entitled "An act for the benefit of the city schools of the town of Frankfort," and for other purposes, approved February 1, 1838.' Under this act the board of councilmen were authorized to raise in one or more classes, as to them seemed expedient, any sum not exceeding one hundred thousand dollars, the money realized to be invested in safe and solvent securities, and the annual interests or profits to be appropriated for the city schools of Frankfort."

That by an act approved March 28, 1872, entitled "An act amendatory of the laws in relation to the city of Frankfort" it was provided that—

"The board of councilmen of the city of Frankfort be, and they are hereby, authorized and empowered to grant, bargain, sell and convey, to rent or lease any and all property or any part thereof, belonging to the said city of Frankfort, be the same lands, tenements, goods, chattels or franchises or immunities, on such terms, and for such sums, and at such times as said board of councilmen shall deem for the best interest of the city of Frankfort."

It was further alleged—

"That by virtue of the authority thus conferred, the board of councilmen of Frankfort, on or before December 31, 1875, disposed of all lottery franchises and privileges conferred by the act of 1869; that the defendant is maintaining, operating and conducting said lottery under said charter and franchise, and claiming the right so to do, under and by authority thereof."

The petition further alleged—

"That on March 22, 1890, by the terms of an act entitled 'An act to repeal so much of section 18 of the act entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16, 1869,' as granted to the board of councilmen of the city of Frankfort the same power and authority as granted to the managers in an act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved February 1, 1838, and to repeal the amendatory acts in relation to the said grants, the General Assembly of the Commonwealth of Kentucky repealed the charter of the Frankfort lottery," etc.

And that—

"By section 226 of the constitution of Kentucky it is provided that 'Lottery and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and no scheme for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked.'"

It was further alleged that the defendants were exercising the privileges and franchises granted by the charter, as aforesaid, and usurping the franchise to operate a lottery under said charter, and judgment of ouster was asked.

The answer of Douglas contains three paragraphs (Record, pp. 4–12).

In the first he simply denied that he had usurped the right, privilege, or franchise to operate a lottery.

In the second he pleaded various acts of the legislature beginning with the act approved February 1, 1838, creating the Frankfort lottery for the benefit of the city schools of the town of Frankfort and for the construction of such reservoirs, pipes, and other works as might be necessary to convey water from Cove Spring to the town of Frankfort, down to and including the act approved March 16, 1869, and the act of March 28, 1872, as set forth in the petition of the defendant in error; that E. S. Stewart, deceased, had entered into a contract with the mayor and board of councilmen of the city of Frankfort on the 31st day of December, 1875, under the authority conferred by the act of March 28, 1872, by which, for a valuable consideration, the mayor and board of councilmen of the city of Frankfort sold, conveyed, and assigned to the said Stewart the said lottery franchise and scheme conferred upon the said city by the act of March 16,

1869; that upon the death of said E. S. Stewart plaintiff in error purchased from his executrix and sole devisee the said franchise, scheme, and contract procured by the said Stewart under the contract of December 31, 1875, and had acquired the right to use the said franchise in accordance with the terms of the contract; that Stewart had executed bond to the city of Frankfort, as required by the acts set forth in the answer, which bond had been accepted, and that the purchases and contracts alleged had been entered into and performed prior to the passage of the act of the General Assembly of the 22d day of March, 1890, and prior to the adoption of the provisions in section 226 of the new constitution, relied upon in the petition of the Commonwealth. The plaintiff in error alleged that, by virtue of the said prior acts of the legislature and by the said contracts, with the terms of which he had fully complied, he became invested with the right to conduct and operate the franchise and to have the earnings thereof, which was a property right under his contract and could not be impaired or destroyed by the said act or constitutional ordinance relied upon in the petition.

The third paragraph pleads *res adjudicata* and *stare decisis*.

The claim of defendant in error, as shown by the petition, is based solely upon the act of 1890, repealing the charter of the Frankfort Lottery Company, and on section 226 of the new constitution. No other ground of action is stated.

The plaintiff in error insisted:

First. That the act of 1890 and the constitutional provision relied upon by the defendant in error do not undertake to repeal his contract rights.

Second. That the contract entered into under the authority of the General Assembly between E. S. Stewart, deceased, and the city of Frankfort was a valid and binding contract.

Third. That the contract of plaintiff in error with the executrix of E. S. Stewart, deceased, was valid and binding under the laws in force at the time it was made, and vested in him a right of property in the lottery franchise before the passage of the repealing act and constitutional ordinance relied upon by the defendant in error, and that he had a lawful right to use the same.

Fourth. That such rights were rights of property, acquired under a contract, based on a valuable consideration, and cannot be divested by subsequent legislation or constitutional revocation, and that the act of 1890 and the constitutional provision were inoperative as to his rights, because they sought, in violation of the constitution of Kentucky and the Constitution of the United States, to impair the obligations of a contract previously made.

Fifth. That the court of appeals of Kentucky in the case of *The Commonwealth against The City of Frankfort*, relative to the identical grant and franchise involved in this action, adjudged that the act of 1869 did confer upon the city of Frankfort a lottery franchise; that the act of March, 1872, did authorize a sale and conveyance of said franchise by the city of Frankfort, and that the conveyance to E. S. Stewart was valid and binding, and that said judgment is final and conclusive upon all said questions; and that the numerous decisions of said court of appeals upon the construction and effect of the various statutes alleged in the answer and of various repealing statutes settled, as a rule

of property in Kentucky, that a lottery franchise was the subject of contract, and that when a sale of such a franchise was made and perfected, under legislative authority, it invested the purchaser with a right of property in the franchise not subject to repeal or impairment by subsequent legislation; that the lottery franchise involved in this action was purchased by the plaintiff in error upon the faith of the decisions of that court rendered prior to such purchase, and the concurrent acts and construction of every department of the State government in accordance therewith, and that such construction must be adhered to in that State.

Defendant in error, however, insisted:

First. That the rights of plaintiff in error were not vested under a contract protected by the constitution of the State of Kentucky and of the United States, but were subject to repeal at the will of the legislature or constitutional convention.

Second. That the former decisions of the court of appeals were not conclusive upon the questions presented.

The State having, as shown by the preamble to the act, used the school fund of the city of Frankfort, and desiring to reimburse the city to some extent, the General Assembly of Kentucky, on the 1st day of February, 1838, passed an act entitled "An act for the benefit of the city schools of the town of Frankfort, and for other purposes," granting to certain persons named in the act the right to raise, by way of lottery, the sum of $100,000 to be appropriated, one-half for the benefit of the city schools and the other half for the con-

struction of reservoirs, pipes, and other works that might be necessary to convey water from Cove Spring to the city. By the fourth section of the act the managers were authorized to sell and dispose of the scheme or of any class or classes of said lottery upon the execution by the purchaser of a bond to the Commonwealth, conditioned faithfully to perform all the terms and provisions of the act; which bond was to be filed in the Franklin county court and approved by the court. Various intermediate acts were passed (all of which are fully set forth in the answer) prior to 1869.

By the act approved March 16, 1869, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," it was provided that the city of Frankfort and its affairs should be conducted by a board of councilmen to be elected and qualified under the provisions of said act; and by section 18 it was provided "that the said board of councilmen shall exercise and possess all the powers and privileges which, by the general laws of the land in relation to towns and cities, are granted to said trustees and councilmen. Said board of councilmen shall have *the same franchises*, power, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city schools of Frankfort, and for other purposes,' approved February 1, 1838, and shall invest all the moneys realized thereunder in safe and solvent securities, and may use and appropriate the interests and profits of such investment for the support of said schools."

By an act approved March 28, 1872, entitled "An act amendatory to the laws of the city of Frankfort" (which is set forth in the petition herein), the board of councilmen were authorized to sell, convey, rent, and lease all property

belonging to the city of Frankfort, including lands, tenements, goods, chattels, franchises, or immunities, "on such terms and for such sums as said board of councilmen should deem best for the interests of the city of Frankfort."

These were the laws of the State relating to the Frankfort lottery grant when, on the 31st day of December, 1875, E. S. Stewart entered into a contract with the mayor and board of councilmen of the city by which it was agreed between the parties that, whereas under the said acts of the General Assembly of Kentucky the city of Frankfort had the power to raise, by the sale of a lottery franchise, the sum of $100,000, upon such terms and in such manner as the city of Frankfort might deem proper, the said city had devised and published a scheme, with sundry classes, and did, in consideration of the agreement upon the part of E. S. Stewart to enter into a bond, with good security, to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said acts and to pay all prizes drawn by any person or persons from time to time in any of the classes aforesaid, according to the provisions of said acts, and that said bond should be received by the city of Frankfort and approved by the county court of Franklin county—sell, convey, and assign unto the said E. S. Stewart the scheme devised by the said city of Frankfort under the said acts. In consideration of which sale, assignment, and transfer Stewart agreed and promised to pay to the said city various sums of money at various times, as set forth in the contract.

These matters are all set up in the answer, and the contract in writing, signed by the parties, duly approved, ratified, and confirmed by the general council of the city of Frank-

fort, is filed with the answer. Bond was executed by the said Stewart to the Commonwealth of Kentucky in the penal sum of $100,000, in accordance with the acts of the General Assembly. The bond was received and held sufficient by the general council of the city, was filed in the Franklin county court, approved and held sufficient by the said court, and ordered to be recorded in the clerk's office, which was done. Under this contract Stewart became the owner of the franchise in controversy in this case.

From the existence of the State government down to the adoption of the constitution of 1891, lottery charters and lottery grants in almost every conceivable form were granted by the General Assembly and upheld by the courts. The public policy of a State is conclusively shown by its legislation and by the action of its executive and judicial authorities. The public policy of Kentucky at the time of the making of the contract between Stewart and the city of Frankfort, as indicated by the legislation of the State and by the course of the executive officers, and the decisions of the courts, for nearly a century, not only tolerated, but maintained, the operation of lotteries. It has been truly said, that more lottery grants exist upon the statute books of Kentucky than there are charters for banks, insurance companies, or railroads. Grants were conferred from time to time by the State legislature, for wise and benevolent purposes, upon the best citizens of the State—men whose names are illustrious in the annals of the State and Federal governments. Grants were frequently made to individuals for personal pecuniary gain, but mostly to private corporations and municipalities for public purposes, such as the improvement of rivers, the erection and support of churches, the maintenance of eleemosynary insti-

tutions, for the benefit of schools, and for other like purposes. Such privileges were continuously granted, acted upon, and upheld in the State until the adoption of the new constitution in 1891. The operation of lotteries and the granting of lottery privileges were questions of public policy with which the State was entirely competent to deal, and with which it did deal on numerous occasions, as stated. Such being the policy of the State at the time Stewart made the contract with the city of Frankfort, the court of appeals of Kentucky having held continuously from 1859, when the question first arose, that contracts for the sale of lottery grants were protected against impairment by the constitution of the State and the Constitution of the United States, he had a right to rely, and did rely, upon the well-settled principle of law that all contracts are expounded and their construction, interpretation, and validity tested and determined by the existing law of the place where made. He, therefore, made the purchase in good faith and complied with all the requirements of the law, and he and his vendees have at all times fully complied with all the terms and conditions of the contract. It is not claimed that they have violated the law or the contract in any particular, but it is contended that although the contract was lawful when made and was still in force, it was destroyed by a legislative act and a constitutional provision.

After Stewart's contract was executed, the General Assembly of Kentucky, by joint resolution adopted March 7, 1876, instructed the attorney general of Kentucky to proceed by *quo warranto* against all persons and corporations claiming the right to operate lotteries under the various acts of the General Assembly of Kentucky. In obedience to this instruction, the attorney general began an action on be-

half of the Commonwealth against the Frankfort Lottery Company, under the act of 1838, and against the Stewart contract of December 31, 1875, based upon the acts of 1869 and 1872, *supra*, as well as actions against the Paducah, Shelby, and Henry lotteries.

The Revised Statutes of Kentucky adopted in 1852, provided that, "three years after the adoption of this revision all lottery franchises and privileges shall cease and determine." In 1878, a general act was passed, repealing all lottery privileges and charters and grants in the State of Kentucky. (See act approved March 30, 1878, General Statutes of Kentucky, p. 912.)

As stated, the attorney general instituted an action in the nature of a *quo warranto* against the city of Frankfort, E. S. Stewart, and others to oust them from the exercise of the franchise in controversy. This action was tried in the State circuit court, and a judgment rendered against the State, from which an appeal was taken to the court of appeals. The judgment of the court below was affirmed by the court of appeals on the 28th of February, 1878.

The decisions of the court of appeals of Kentucky in the case of *Webb vs. Commonwealth* and *Commonwealth vs. Douglas*, also, had been delivered when, E. S. Stewart having died, the plaintiff in error, as he shows in his answer, contracted for the scheme and became invested with the right to conduct, manage, and operate said lottery for a valuable consideration; and he further alleges in the answer that he paid large sums of money for the scheme and contract, and that he has made contracts and incurred liabilities involving large sums of money upon the faith of the contract and

relying upon the terms thereof and upon the decisions of the courts of the State adjudging the same to be valid, obligatory, and inviolable.

Not only had the court of appeals of Kentucky held the Stewart contract, relative to the franchise in dispute in this case, valid and binding, and, through a series of years, continuously upheld lottery grants and adjudged contracts made in relation to them sacred and inviolable, but this construction had been adopted by all the departments of the State government and by the municipal government of the city of Louisville, where the lottery was conducted.

The governor of Kentucky, in 1886, upon a meeting of the General Assembly of the State, submitted a message in which, after stating that lotteries were being operated in Kentucky which had been sustained by the court of appeals of the State, and that such lotteries should be licensed, he recommended that an act be passed upon the subject. Hence, on the 17th of May, 1886, the following law was enacted:

"Every corporation or person to whom a lottery franchise has been granted by the General Assembly of this Commonwealth, and which franchise has been declared by a judgment of the court of appeals to be a lawful and existing one, or the *lawful grantee*, alienee, legatee or assignee of such a franchise, shall be authorized to operate and conduct a lottery in this Commonwealth when he, she, or it shall have filed with the auditor of public accounts a certified copy of the judgment rendered, and the opinion delivered by the court of appeals in a case heard and determined before it, in which it has determined that a lottery could be lawfully operated under said grant from the General Assembly of this Commonwealth, and obtain from the said auditor a license (which he is hereby authorized and directed to issue

on the filing of said copies hereinabove required) reciting the filing of said copies and authorizing the operation of said lottery for one year from the date thereof on the condition that said licensee shall, within five days thereafter, pay to the said auditor of state the sum of two thousand dollars; and said license issued by the said auditor, as hereinabove directed, and any and all renewals thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this Commonwealth of the right of the licensee to operate a lottery for the period therein named. And if any corporation, person, alience, grantee, legatee or assignee of any lottery franchise granted by the General Assembly of this Commonwealth, and which has been declared by judgment of the court of appeals to be a lawful and existing one, shall operate a lottery in this Commonwealth without first having obtained the license hereinbefore provided for, the attorney general shall at once institute an action against it or him in the Franklin circuit court in the name of the Commonwealth, and shall recover therein the sum of three thousand dollars, besides the cost of the action, of which sum when collected, one thousand dollars shall belong to the attorney general. A *capias ad satisfaciendum* shall issue on the judgment against any person provided for in this act immediately after the rendition thereof. The license herein provided for shall be renewed on or before the first Tuesday in January in each and every year after the issuance of the original license hereinbefore directed, upon the request of the licensee or his assignee, and it shall, as is provided in the case of the original license, be conditioned on the payment of the tax of two thousand dollars herein provided for, and which renewal license shall authorize the licensee or his assignee to operate and conduct a lottery within this Commonwealth, and shall have the same legal effect as the original license, as hereinbefore provided."

By this act it is clear that the legislature of Kentucky recognized the legal existence of the lotteries and authorized

their operation, and under it the plaintiff in error and those under whom he claims paid the State of Kentucky two thousand dollars per annum until the institution of this action, having filed a copy of the opinion of the court of appeals of the State rendered in the case of *The Commonwealth vs. The City of Frankfort* with the auditor of public accounts, and obtained annually a license, in accordance with the act. The following acts have also been passed on the same subject:

Acts of 1887–'8, vol. 3, page 396, chapter 1194, amending act of May 12, 1884: For every lottery office, two hundred dollars per annum.

Acts of 1885–'6, vol. 2, chapter 1009, page 512, amending act of May 12, 1884.

Acts of 1883–'4, vol. 2, chapter 1423, page 1208, which corrects two errors in "An act to revise and amend the tax laws of the city of Louisville," approved April 25, 1884.

Acts of 1883–'4, vol. 2, chapter 1118, page 613. An act to revise and amend the tax laws of the city of Louisville, section 9, page 613: "For every lottery office or agency therefor, ($200) two hundred dollars."

Under an act establishing a new charter for the city of Louisville Ordinance No. 206, ordained: "The price of license for a year for keeping a lottery office shall be two hundred dollars." Approved October 29, 1853.

Elliott's Charter and Ordinances of the City of Louisville, 681.

Section 96 of the charter of the city of Louisville of March 3, 1870, provides:

"The sinking fund to pay the bonded debt is hereby continued as established by law."

Section 8, article 6, of the city charter of 1851 provides:

"That the proceeds of all the aforesaid licenses or *ad valorem* taxes levied in Louisville or any part of it, and the proceeds of all notes and bonds now held by the city of Louisville for money coming to her, whether due or not, also the net proceeds of the wharves and market-houses of said city, shall be, and are hereby, set apart as a fund to pay all the existing liabilities of said city, whether due or not due, and the accruing interest thereon, and until said liabilities shall be fully discharged or provided for as hereinafter directed, no portion of said funds shall in any manner be used or applied to any other purpose except as hereinafter provided, nor shall any warrant or order upon the treasurer, nor any demand against the said city, except upon liabilities now existing, be received in payment of any tax, license, or demand, or any source of revenue hereby appropriated to said funds."

By the 10th section of an act approved March 9, 1867 (see Sessions Acts of 1867, vol. 2, p. 420), the sinking fund is created a corporation separate and distinct from the treasurer of the city, its resources are provided for, and the general council is denied the power to pass ordinances or legislation to diminish the present resources of the fund until the debts of the city then or thereafter charged or chargeable upon said fund are paid, but may pass laws to increase said resources, etc.

By the 4th section of the act of March 15, 1869, entitled "An act to increase the resources of the sinking fund of the city of Louisville" (volume 2, p. 420, Acts of 1869), it is provided:

"The sinking fund shall be under the control and management of the commissioner of the sinking fund, and shall

be held and sacredly used for the payment of said bonded debt; the resources of the sinking fund shall not be diminished," etc.

The resources of the sinking fund are in part derived from the license tax on various corporations in the city of Louisville, and are dedicated by the charter and the acts hereinabove cited to the payment of the public debt of the city and the interest thereon as it matures. This constitutes a contract between the holders of the bonds and the municipality of the city of Louisville under express legislative authority.

City of Louisville vs. Murphy, 86 Ky., 60.
Von Hoffman vs. City of Quincy, 4 Wallace, 535.

These are briefly the facts showing the history of the rights of the plaintiff in error, as alleged in his answer in this action, and admitted by the demurrer to be true, and upon these facts we shall endeavor to show that the judgment of the court of appeals was erroneous and ought to be reversed.

The authorities chiefly relied upon by the defendant in error are based upon the principles claimed to have been announced by this Court in the case of *Stone vs. Mississippi*, 101 U. S., 814. We submit that the case has no application to the questions now presented. The State of Mississippi had by an act approved February 16, 1867, incorporated the Mississippi Agricultural, Educational, and Manufacturing Aid Society, and conferred upon it lottery privileges for twenty-five years. On the 15th of May, 1868, the constitutional convention of Mississippi adopted a new constitution, which provided "that the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed,

nor shall any lottery heretofore authorized be permitted to be drawn or tickets therein to be sold;" and an act was passed by the General Assembly, in pursuance of the constitutional provision, prohibiting all kinds of lotteries in the State.

The attorney general, in 1874, filed a petition in the nature of a *quo warranto* against John B. Stone and others, alleging that, without authority of law, they were then carrying on a lottery under the name of the Mississippi Agricultural, Educational, and Manufacturing Aid Society. The defendants in the case relied upon their charter privilege, claiming that they had obtained it from the General Assembly of Mississippi, by which they were authorized, in consideration of the payment of five thousand dollars per annum as an annual tax, to operate the lottery for the period of twenty-five years.

The State court held that the lottery franchise was abrogated and annulled by the constitutional provision of 1868. The only question submitted to this Court for decision was, whether or not the grant of the franchise by the General Assembly, while in the hands of the legislative grantee, was subject to repeal, and the court held that it was. We admit the proposition, and it has never been denied in any of the authorities we have been able to find. The right of a legislature or a constitutional convention to repeal a lottery grant and thereby withdraw the privilege, where no rights have been acquired or liability incurred in consequence of its passage, is clear and unquestionable. In the Mississippi case there was no claim to a lottery franchise, except by the original grantee. It stood in his name, with the undoubted power of the State to recall it at any time. No sale of the privilege had been

made, nor had any authority been conferred by the State upon the grantees to make a sale or a contract in reference thereto. There were no rights of any one involved, except those of the original parties to the transaction—the State of Mississippi and the Mississippi Agricultural, Educational, and Manufacturing Aid Society. The State of Mississippi, from the date of its admission into the Union (1817), never at any time authorized the operation of a lottery, until the enactment of the charter under which Stone asserted his right. The public policy of the State, unlike that of Kentucky, was uniformly opposed to lottery grants.

This Court decided (and could decide only) the question presented by the record, viz., whether or not the grantees of a lottery franchise had contract rights which were protected by section 10 of article I of the Federal Constitution against impairment by the new constitution of Mississippi. There is no reference in the opinion to the rights of third parties acquired from the grantee of the franchise under legislative authority; no such question was presented or could have been presented, and the decision is no authority upon that proposition. It is true that the *dictum* of the Court might be subject to the construction that no vested right exists in a lottery privilege, because a valid contract cannot be made by a State which would prevent it from exercising its police powers; but an analysis of the opinion will show that such is not the authoritative decision. The learned Chief Justice said:

"It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States

from passing laws impairing the obligation of contracts. The doctrines of *Trustees of Dartmouth College vs. Woodward*, 4 Wheat., 518, announced by this Court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only *any contract the charter may contain*. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is whether a contract has, in fact, been entered into; and, if so, what its obligations are? In the present case, the question is whether the State of Mississippi, in its sovereign capacity, did, by the charter now under consideration, bind itself irrevocably by a contract to permit 'the Mississippi Agricultural, Educational, and Manufacturing Aid Society, for twenty-five years, to receive subscriptions, cast lots,' etc.—in other words, to operate a lottery?"

The Court held, in accordance with all the prior decisions in the various States of the Union, wherever the question had been presented, that the grant of Mississippi to the society contained no contract between the State and the corporation, and that therefore the constitutional provision had no application to the case. It is the same doctrine announced by the courts of Kentucky and by this Court long before the opinion in the case of *Stone vs. Mississippi* was delivered. The Chief Justice in his opinion further said:

"It is true that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its succes-

sors to make such laws as they may deem proper in matters of police."

And the Court held that lotteries are proper subjects for the exercise of the police power of a State, citing the opinion of Mr. Justice Grier in *Phalen vs. Virginia*, 8 How., 163, to support that position. The language of the Court must be held to have been used with special reference to the facts of the case under consideration and the question involved. No vested rights of property arising upon contract were involved in the case, and, therefore, nothing that the Court might have said upon the subject would be authority; but the Court wisely refrained from saying anything upon the question of the rights of third parties to a lottery grant obtained for a valuable consideration under a contract made by authority of the State. Although Mr. Chief Justice Waite said that no "legislature can bargain away the public health or the public morals—the people themselves cannot do it, much less their servants"—yet we find the same learned judge, seven years afterwards, in the case of *City of New Orleans vs. Houston*, 119 U. S., 265, holding that the Louisiana State Lottery Company had a valid contract with the State of Louisiana, in its sovereign capacity, by which the State had bound itself irrevocably to allow the Louisiana Lottery Company to operate its lottery franchise for the period of twenty-five years, and that the grant of the charter could not be repealed or affected by subsequent legislation, because it was contained in the constitution of the State. It was held that the grant of the charter in the constitutional provision conferring the lottery privilege upon the Louisiana State Lottery Company withdrew the lottery franchise from the scope of the police power

of the State to be exercised by the General Assembly, so far as that company was concerned, and that the people had made a binding contract on the subject.

The Court said:

"And the charter of said company is recognized as a *contract* binding on the State for the period therein specified, except its monopoly clause, which is hereby abrogated."

And it held that the law taxing lotteries was invalid, so far as it affected the Louisiana Lottery Company.

It is well settled that an act of the legislature of a State, when not in contravention of a provision of the State or Federal Constitution, is as much an act of sovereignty as the declaration of a constitutional convention. A State legislature is invested with the whole sovereign power of the people, subject only to the limitations imposed by the constitution.

In the case of *McPherson vs. Blacker*, 146 U. S., 25, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"A State, in the ordinary sense of the Constitution, said Chief Justice Chase (*Fox vs. White*, 7 Wall., 721), is a political community of free citizens, occupying a territory of definite bounds and organized under a government sanctioned and limited by a written constitution and established by consent of the governed. The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, unless the fundamental law power is elsewhere reposed," etc.

See also *Delmas vs. Insurance Company*, 14 Wallace, 669; *White vs. Hart*, 13 Wallace, 652; *Oliver, sheriff, vs. Memphis & L. R. R. Company*, 30 Ark., 128; *Osborne vs. Nicholson*, 13 Wallace, 656; *New Orleans Gas Co. vs. N. O. Light Co.*, 115 U. S., 650; *Gunn vs. Barry*, 15 Wall., 215.

It, therefore, follows, that *Stone vs. Mississippi*, as explained by the Court in the case of *New Orleans vs. Houston*, is an authority in favor of the plaintiff in error upon the proposition that the State, if it was clear that it intended to do so, could withdraw a lottery privilege from the police power of the State and make or authorize others to make a valid and binding contract in relation thereto, which would be protected by the Constitution of the United States.

Mr. Chief Justice Waite referred, as has been stated, to *Phalen vs. Virginia*, and based his decision in part upon the opinion in that case; yet we find that Mr. Justice Grier, in delivering the opinion of the Court in that case, substantially maintained the views for which we contend. The plaintiff in that case had been convicted on an indictment for selling lottery tickets contrary to the act of the Virginia legislature passed on the 25th of February, 1834. He pleaded that the act was in violation of the constitution of the State, forbidding the passage of a law impairing the obligations of contracts, because in 1829 the General Assembly had passed an act appointing five commissioners, whose duty it was to raise by way of lottery thirty thousand dollars for the purpose of making Fauquier and Alexandria turnpike road. On the 25th of November, 1834, the act for the suppression of lotteries was passed, containing these provisions:

"First. That nothing herein contained shall be construed

to the extent of, or interfere with, contracts already made for the drawings of any lotteries, the drawing whereof, by the provisions of such contracts, shall extend to a period beyond the 1st day of January, 1837; and

"Second. That nothing herein contained shall be construed to the extent of, or interfere with, any contract which may hereafter be made under, or by virtue of, any existing law authorizing the same for the drawing of any lottery, the drawing whereof shall not extend beyond the 1st day of January, 1840."

It will be seen that the decision of Mr. Justice Grier was rendered in a cause involving only the rights of the original parties to the grant, and he said (p. 166):

"It might admit of some doubt whether the act of 1829 grants any franchise or constitutes any contract, either with the commissioners therein appointed or with the turnpike corporation. It imposes certain duties upon each. The commissioners are required to use the license thus given, not for their own benefit, but for public purposes. The money procured by the proposed lotteries is to be paid over to the Fauquier and Alexandria Turnpike Road Company, to be by them expended in the improvement and repair of the road. It is true that the corporation might receive greater benefits from the repair of the road than the other citizens of the State, but the act imposes no duty upon them as a previous consideration. They are not required to make any repairs until they receive the money. But, assuming that this would be too narrow a construction of this act, and that it conferred a privilege or benefit upon the corporation in the nature of a *franchise or irrevocable contract*, yet in its very nature it cannot be considered illimitable as to time."

Again the Court said:

"When the legislature of Virginia passed this most salu-

tary act for the suppression of lotteries, *they, with commendable caution, protected all vested rights*, and, notwithstanding the neglect to perform the duties imposed by the act of 1829, the act of 1834 does not revoke the grant or annul the license, but limits the time to six years, within which time the duties must be performed."

Again:

"It is a part of the common law that the king cannot sanction a nuisance; but, without asserting that the legislative license to raise moneys by lotteries cannot have the sanctity of a *franchise or contract in its nature irrevocable*, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy as other acts of limitation which have received the sanction of this Court."

It will be observed that the Court recognized that a lottery franchise may become the subject of an irrevocable contract, entitled to the protection of the constitutional provision against the impairment of contracts.

The case of *Boyd vs. The State*, 53 Ala., was between the original grantee and the State, and was not decided upon the question arising in this case; the act granting the privilege was held unconstitutional because the title did not express the subject-matter of the act, and this judgment was affirmed by this Court in 94 U. S., 645. No question was decided by the Court, except that the original act of incorporation was unconstitutional and void.

In the case of *Moore vs. State*, 48 Miss., 147, the issues presented were between the original parties to the grant. There had been no sale or transfer authorized or made, and the statutory bond required had not been executed before the adoption of the constitution of 1868.

The New Orleans Gas Light Company, 115 U. S., 650, was granted by its charter the exclusive privilege of furnishing gas to the inhabitants of New Orleans for the period of forty years. Afterward the constitutional convention adopted a provision by which it was declared that "the monopoly features in the charter of any corporation now in existence in this State, save such as may be contained in the charter of railroad companies, are hereby abolished," and by subsequent legislation certain rights were granted to the defendant, The Louisiana Light Manufacturing Company. The New Orleans Gas Light Company brought suit to enjoin the defendant from digging up the streets and supplying illuminating gas, etc., during the period of fifty years. In discussing the question this Court said:

"It is true, as suggested in argument, that the manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. . . . But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort and in some sense to the public health and the public safety, and for that reason is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may, at pleasure, recall the grant of exclusive privileges to the plaintiff, and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public

safety will constitute a contract the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this Court, in which the nature and scope of the police power has been considered."

The Court then proceeds to analyze the Slaughter House cases, reported in 16 Wallace, 62, the case of *Stone vs. Mississippi, supra*, and *Gibbons vs. Ogden*, 9 Wheat., 203, and other cases, and then says (page 522):

"Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers."

The Court said:

"We are referred to *Butchers' Union Company vs. Crescent City Company*, 111 U. S., 746, as authority for the proposition that the State is incapable of making a contract protected by the National Constitution in reference to any matter within the reach of her police power in its broadest sense; but no such principle is there established."

And the Court concluded by saying:

"It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the State was incapable—her authority in the premises not being at the time limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants by means of a valid contract with a private corporation of her own creation. We may repeat here what was said by Chief Justice Taney in *Ohio Life Insurance and Trust Company vs. Debolt*, 16 How., 428, in reference to the authority of a State to limit the exercise of its power of taxation: 'But whether such contract should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sov-

ereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this Court has no control; for it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions. It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they themselves possess, or may restrict them within such limits as they deem best and safest for the public interest; yet if the contract was within the scope of the authority conferred by the constitution of the State, it is, like any other contract made by competent authority, binding upon the parties; nor can the people or their representatives by any act of theirs afterward impair its obligation. When the contract is made, the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this Court to carry it into execution. That duty must be performed.' And the Court granted the perpetual injunction asked for."

The same ruling was made in the case of the *Water Works Company*, 115 U. S., 673, the only difference being that in the latter case the right to supply water to the inhabitants of the State was involved, a matter clearly within the sovereign as well as the police power of the State; but the act granting the exclusive privilege was held to be a contract not subject to repeal or modification by the constitutional convention.

See *City R. W. Co. vs. Citizens' St. R. W. Co.*, 166 U. S., 557;
Indianapolis vs. Indianapolis Gas Light Co., 66 Ind., 396; *Indianapolis vs. Consumers, etc.*, 140 Ind., 107.

In the case of the *Wabash R. R. Co. vs. The City of Defiance*, decided by this Court May 10, 1897, it was held that the power of municipal corporations to establish and alter the grades of streets is a police power; and yet it is clear from the reasoning of the Court, and the cases cited, that in its opinion the legislature of a State might authorize cities and towns to make contracts with respect to the use of such highways which would prevent the subsequent exercise of the power to change grades or alter streets in such manner as to conflict with the rights of the other parties to the contracts. The *Philadelphia Railroad Company's Appeal*, 121 Penna., 44, is cited with approval, and is distinguished from the ordinary cases of such contracts upon the ground that "the act of the legislature gave the city express permission to grant to the company the use and occupation of its streets 'so long as said streets . . . shall remain open to public use and travel,' and declared that such grant should be 'as valid and effectual to transfer the rights and privileges therein contracted for to the said railroad companies or any of them . . . as if made between individuals.'" In the case cited, the city, after making the contract authorized by the statute, undertook so to alter the grade of the street as to make it cross the railroad at a level, thus destroying the overhead crossing, and it was held that this was a violation of the agreement.

There was no law in existence prohibiting the making of the contracts between Stewart and the city of Franklin and between Stewart's executrix and appellee when the contracts were made. No constitution of Kentucky prior to the one adopted in 1891 prohibited the granting of lottery franchises, as was done by the act of 1869, or prohibited the passage

of the act of 1872. The contracts were, therefore, valid and binding when made, and even if the construction contended for by the learned attorney general for the Commonwealth were correct, yet, according to the well-settled rule of law, the contract rights of appellee must be upheld.

In the case of *Joliffe vs. The Steamship Company*, 2 Wall., 450, Mr. Justice Field delivered the opinion of the Court in a case based upon the following facts: By an act of the General Assembly of California it was provided that all incoming and outgoing steamers from the harbor of San Francisco should be carried out of and into port by licensed pilots, and the law provided, among other things, that the first pilot offering his services to any steamship coming in or going out of port should be accepted, and, if refused, then one-half of the pilot fees should be paid by the vessel or master thereof to the pilot thus refused as a penalty. Joliffe tendered his services as pilot to the owner of the Pacific Mail Steamship Company, going out from San Francisco, and they were declined. The legislature repealed the law. In the meantime the pilot had instituted a suit for the recovery of his fees, and the California court decided that the repealing act destroyed his right of action. This Court said that "where a right inchoate in character is created under a statute, and there is afterward a repealing act which destroys the original act, the inchoate right exists in the party for whose benefit it was made, as a vested right, and gives him a vested right to the penalty."

In the same case it was said:

"There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The claim of the plaintiff for

half pilotage fees resting upon a transaction regarded by the law as a quasi-contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute."

It will be observed that the statute in this case prescribed a police regulation, the piloting of steamers upon navigable waters, and provided a penalty for its violation, and the Court went so far as to hold that, in a case of this kind, a repealing statute, enacted after a right to the penalty accrued, was invalid to the extent of such right.

After the close of the late war, and following the reconstruction of the Southern States, many difficult questions arose, growing out of the condition of the people at the conclusion of the war, and the constitutional conventions of those States had to deal with them. Various constitutions provided that the legislature should not have the authority to confer upon any judge or court the power to give a judgment upon an obligation the consideration whereof was either the hire or sale of a slave. Suits were brought in the courts of Georgia and other States upon contracts both for the hire and sale of slaves made when the institution of slavery was lawful in those States, and this Court, in numerous cases, held that the contracts, being valid by the laws of the State at the time they were made, could not be impaired by subsequent constitutional prohibition. *White vs. Hart*, 13 Wallace, 646; *Osborne vs. Nicholson*, 13 Wallace, 654; *Boyce vs. Sabler*, 18

Wallace, 546; *Delmas vs. Insurance Company*, 14 Wallace, 661; *Gunn vs. Bary*, 15 Wallace, 610.

In the case of *Dodge vs. Woolsey*, 18 How., 401, the facts were, substantially: Prior to the adoption of the constitution of Ohio of 1851 a system of banking was established under the acts of 1845–'6 of that State, and it was enacted that the banks organized should pay during their corporate existence, in lieu of all other revenue and taxation, the sum of 6 per cent. upon their net earnings. The constitution of Ohio of 1851 provided that *all property shall be* equally taxed. The banks claimed that under the provisions of the act of 1845 they had a contract with the State of Ohio, irrevocable and irrepealable. The circuit court of the United States refused, upon the suit of Dodge, a stockholder in one of the banks, to enjoin the revenue authorities from collecting the tax. This Court, upon appeal, speaking through Mr. Justice Wayne, said:

"A change of constitution cannot release a State from contracts made under a constitution which permits them to be made. The inquiry is: Is the contract permitted by the existing constitution? If so, and that cannot be denied in this case, the sovereignty which ratified it in 1802 is the same sovereignty which made the constitution of 1851. Neither have more power than the other to impair a contract made by the State legislature with individuals. The moral obligations never die. If broken by States and nations, though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less."

From 1709 to 1824, every budget submitted to Parliament by the British government, contained lottery schemes for the benefit of the Crown. Massachusetts, New Hampshire, Con-

necticut, Rhode Island, New York, Pennsylvania, Delaware, Maryland, New Jersey, North and South Carolina, Georgia, Alabama, Missouri—in fact, nearly every State in the Union—have provided for their schools, churches, and other private enterprises by lottery. The foundation of the present great library at Harvard University was laid by the operation of a lottery, and Yale has received and enjoyed revenues derived from the same source. The Government of the United States has authorized the operation of lotteries, and this Court has enforced rights in relation thereto. In *Washington vs. Young*, 10 Wheat., 406; *Shankland vs. Washington*, 5 Pet., 39, the contract of the municipality to receive the profits of the drawing was expressly recognized.

From the foundation of the United States Government down to a very recent date, lotteries have been resorted to for the purpose of recruiting the public revenues or maintaining churches and charities, and this, as has been shown, was the policy in Kentucky when the contract rights of the plaintiff in error were acquired.

In the year 1838, the supreme court of Tennessee, in the case of *Bass vs. The Mayor of Nashville*, reported in 1 Meigs, 421, upheld the doctrine contended for by plaintiff in error and made the distinction between contract rights and a mere gratuity or license, evidenced by the original grant of charter, laying down substantially, more than half a century ago, the same doctrine that was enunciated by this Court in the case of *Stone vs. Mississippi*, *supra*. In 1831, an act was passed by the legislature of Tennessee authorizing a lottery for the continuation of Union street, in the city of Nashville. The mayor and certain other persons, including John M. Bass, were appointed trustees with full power and authority

to manage and superintend the drawing of a lottery for the purpose of raising seventeen thousand dollars to be applied to the opening of a street in Nashville. The trustees were authorized to make a sale of the lottery tickets, to let out, farm, or sell one or more classes of the lottery, and to take bonds from persons to or with whom such sales or deposits might be made, and to do all things necessary to carry into effect the provisions of the act. The new constitution of Tennessee provided that "the legislature shall have no power to authorize lotteries for any purpose and shall pass laws to prohibit the sale of lottery tickets in this State;" and under this provision the legislature of 1835–'6 passed "An act to prohibit the drawing of lotteries and the sale of lottery tickets." The first section repealed all laws which authorized any person or body corporate or politic to draw any lottery for any purpose whatever, and the second section prohibited the drawing or attempt to draw any lottery in the State, under penalty of one thousand dollars and three months' imprisonment.

The third section prohibited the vending and selling of tickets. The trustees refused to draw the Union Street lottery after the passage of the acts named, and an action was brought to compel them to operate the lottery, and although the policy of that State, as declared by its legislature, had been opposed to lotteries in general, the court, in deciding the case, said:

"Lotteries then stood reprobated by legislative enactment and judicial decisions as contrary to public policy and to good morals, and a wise and enlightened public sentiment everywhere sustained the enactment and the decision. Under such circumstances, we ask, What was conferred upon the

defendant by the act of 1831, chapter 69? Nothing, certainly, but an immunity, in that particular instance and for the specified object, from penalties and indictments; an indulgence granted to them to perform acts which were in general held to be against public policy and good morals; a permission to do that for the doing of which all others would have been subjected to fine and imprisonment. If, then, *before the defendants had done anything under the act of* 1831, this privilege conceded to them, of gaming, without liability to criminal prosecution until they had realized a specified amount of profits, had been abrogated by a subsequent legislature and they had been placed upon the ground with all other citizens, of what could they have complained? Could they have, on just grounds, alleged that a contract had been impaired or a right divested? For this surely no one will contend. If, then, they had organized a scheme and had drawn one or more classes of the lottery, as the bill alleges was done, and, so to speak, one or two games had been played and finished, and the legislature finding a pause in their proceedings, *when no purchaser of a scheme* and no holder of a ticket could be injuriously affected, and availing themselves of this pause, had prohibited the further exercise of this extraordinary privilege, could the defendants be heard to object to the prohibition upon the ground that they had not realized all the profits which they had been promised and which they expected? Certainly not. In the precise state above supposed stood this matter when the convention in 1834 adopted the fifth section of the eleventh article of the reformed constitution, in which they provide that the legislature 'shall pass laws to prohibit the sale of lottery tickets in this State.' This was itself a prohibition, and was announced to the complainants before the formation of their contract with the defendants. And, again, although that contract is dated before the act of 1835, yet neither the bill nor the answer alleges that the complainants, before the passage of that act, were at any trouble, made any advances, or incurred any

liability whatever. They are therefore in no better situation with regard to the repealing law than the defendants."

Such was the decision of the supreme court of Tennessee more than a half century ago. The principles declared in the opinion of the court in that case are substantially the same more recently announced by this Court in the case so much relied upon by the attorney general in this one. "The lottery privilege," says the Court, in substance, "may be revoked when no purchaser of a scheme and no holder of a ticket can be injuriously affected thereby. When no third party is alleged to have made any advancements or incurred any liability whatever, the franchise may be destroyed, but not otherwise."

In 1839, the supreme court of the State of Delaware, in the case of *The State vs. Phalen and Payne*, 3 Harrington, 441–445, decided this question in the same way. The defendants were drawing a lottery under an act passed on the 14th of January, 1827. In 1831, an act was passed requiring each lottery company to pay the sum of ten dollars for each and every scheme or class drawn; and the question arose whether or not the latter act impaired the obligation of a contract in violation of the constitution of the State of Delaware. The court in that case said:

"We all agree that the act of 1827, authorizing the lottery to be drawn, is neither a grant nor a contract. It is a bare delegation of authority by which the drawing of a lottery is sanctioned until a certain amount or sum shall be raised for a certain purpose. If the act had confined the authority to the simple agency of the managers on behalf of the State, the question now presented might not have occurred; but in the act we find the managers are empowered to raise the

sum of ten thousand dollars, either by drawing the lottery themselves or through their agents, *or by a sale of the powers granted in the lottery act.* Hence, although we regard the act as making no grant or contract with the managers, we cannot disregard the authority granted to them to make a contract with others for a valuable consideration which would be binding on the State. While the authority or power delegated remained in the hands of the managers or agents of the legislature, it was subject to the control of the legislature, either to repeal, modify, or change. As a mere letter of attorney, it could be revoked; but, from the time when a contract was made under the authority conferred by the act to make a sale, a new state of things took place—an authorized contract between the managers and third persons, for a valuable consideration, conferred new rights and imposed new obligations. The contract having been made in pursuance of the powers contained in the letter of attorney, and in strict conformity therewith, as also to give effect to the purpose therein intended, must be obligatory upon the principal; nor under such circumstances can it be competent for the principal, even should he revoke the letter of attorney, to annul or even impair the contract; its obligation rests upon him as strongly as if he had himself primarily made it and received the consideration paid. Regarding, therefore, the legislature as the principal, under whose authority the contract of 1839 was made, we do consider they had no right to violate this contract or so revoke or modify the contract as to impair its obligations."

And the court held the act of 1831 void.

This question was adjudged in the same way in the case of *Phelan vs. Commonwealth*, 1 Robinson, 713, in the year 1842.

In 1842, in the case of *Davis vs. Caldwell, etc.*, 2 Robertson (La.), 271, brought to recover compensation for services ren-

dered by the plaintiff in aid of the drawing of a lottery in 1839, it was urged that lotteries were forbidden by the statutes of the State. The court in that case said: "The question whether the grant of the privilege to raise money by lottery, at first indefinite in point of time, may be afterwards limited, before any rights have been acquired under the first grant, is one which we think presents no difficulty. Such an act does not, in our opinion, impair the obligation of a contract nor destroy any vested rights. The permission to draw a lottery is not, *per se*, a contract, and, until it has been accepted and rights acquired under it, is perfectly within the control of the legislature," recognizing the same principle and the same distinction as contended for in this case and maintained by the decisions cited.

In the case of the *Mississippi Society of A. S. vs. H. Musgrove*, reported in 44 Miss., 837, relative to a lottery franchise, the court said:

"The State may take away by statute what has been given by statute, *unless rights under it have vested*. If the legislature delegate authority it can revoke it if nothing has been done under it which creates a vested right. . . . The authorities are abundant that the legislature may repeal a lottery grant, unless contracts have been made or rights vested, as between the grantees and other parties, which would be infringed by the repealing law."

In the case of *Boyd & Jackson vs. The State*, decided in 1871, reported in 46 Ala., 333, the appellants had been indicted under the general statutes of the State prohibiting lotteries and imposing penalties for carrying on the business of setting up and conducting a lottery. The defendants relied upon the act establishing the Mutual Aid Association and author-

izing a lottery thereunder. The latter act was repealed by the General Assembly of Alabama on the 8th of March, 1871, and the defendants contended that the State could not repeal the first act under which they claimed and for which they had paid two thousand dollars. The court said:

"From this statement of the case, it is very evident that the defendants, when they were indicted, were acting under a license granted by legislative authority. The repeal of the act of December 10, 1868, could not impair this right. It was the fruit of a contract, a vested right, which the State could not take away. It was fenced about and protected by the highest principles of justice and by the supreme law. The State had sold the privilege to set up and carry on a lottery for a year at least, and had received the price of the privilege in advance. This was clearly a contract, which the State is forbidden to impair. In such a case the State is the grantor, and it is estopped by its own act"—and cited the case of *Fletcher vs. Peck*, 6 Cr. R., 137, and other cases.

The court reversed the judgment, with directions to dismiss the indictment. To the same effect is the case of *Broadvent vs. Tuscaloosa Scientific and Art Association*, 45 Ala., 170. In the State of Missouri the right to operate lotteries has been a fruitful source of litigation, and the opinions of the supreme court of the State relative to this question have been cited and followed in nearly every State where questions of like character have arisen. The first case to which we call the Court's attention is that of *The State of Missouri vs. Jacob Hawthorn*, reported in 9 Mo., 393 to 396. Judge Napton, delivering the opinion of the court, said:

"Hawthorn was indicted by the grand jury of St. Louis county for selling lottery tickets in the lottery for the benefit

of the St. Louis hospital. On the ninth of February, 1833, the legislature of Missouri passed an act authorizing a lottery to be conducted for the purpose of raising money for the use of the Sisters of Charity in the city of St. Louis, and for the use of their hospital. By the second section of the act commissioners were appointed and were authorized to appoint a manager to sell the tickets and draw the lottery; the third section required bond, etc., from the manager. On the twenty-sixth day of February, 1835, a supplementary act was passed, similar in its character to the act of 1872, involved in this case. By the act of 1835, the Missouri legislature authorized the commissioners 'to contract with any person to have said lottery drawn in any part of the United States, on such terms as they shall consider most advantageous,' the commissioners to take bond, etc. On the twenty-eighth day of December, 1835, an agreement was made between the commissioners and one D. S. Gregory, by which, after reciting the acts of the General Assembly, as stated, and that the commissioners had agreed to dispose of the right of drawing the schemes of a lottery or lotteries for the purpose of raising the sum of money authorized by the act, provided that the commissioners, in consideration of two and one-half per cent. of the sales of tickets in this State, did sell, dispose, assign, transfer, and set over to said Gregory, sole manager and conductor of said lottery, and transfer to him the sole and exclusive right to draw such scheme or schemes, etc. D. S. Gregory assigned this contract to Walter Gregory, and Hawthorn was appointed by Walter Gregory as his agent. On the nineteenth of December, 1842, the legislature passed an act repealing all laws authorizing the drawing of any lottery or the sale of any tickets within the State of Missouri, imposing heavy penalties for its violation."

It was for the violation of this statute that Hawthorn was indicted. The lower court held that Hawthorn and

his employer, Walter Gregory, had a vested right, dismissed the indictment, and the State appealed the case. The Supreme Court said:

"The only question arising in this case is, whether this last-mentioned act, so far as it affects the present defendant, is contrary to that clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts. Our opinion in relation to the act of February 9, 1833, was intimated in the case of *Freheigh vs. The State*, and the opinion is still entertained that laws of this character do not create any contract. Neither the commissioners appointed under the act nor the Sisters of Charity, for whose benefit the money was to be raised, acquired any interest which subsequent legislation could not take away. That act did not create any contract between the State and the commissioners or between the *cestuis que trust* which could not be modified or repealed at the pleasure of the legislature. The money proposed to be raised was a mere gratuity, without consideration, and the commissioners being merely the agents of the legislature, the law imposed no obligation upon a succeeding legislature to continue their authority or permit the drawing of the lottery and the sale of the tickets. The act of February 26, 1835, presents a different aspect. By that act the commissioners were authorized 'to contract with any person to have said lottery drawn in any part of the United States, *on such terms as they shall consider most advantageous.*' We have no difficulty in saying that a contract made in pursuance of this act is as much obligatory upon the State as upon the other contracting party, and the legislature could pass no law impairing its obligation."

The Court held that the contract with Gregory was authorized by the act and concluded its opinion by saying:

"We are aware that it is, at all times, a delicate task for a court to question the validity of a legislative enactment. It

is certainly an unpleasant one where the court feels every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals. These considerations, however, cannot be permitted to discharge us from the performance of a duty imposed by the constitution, and especially where reason and justice unite with the constitutional prohibition in teaching that a legislature can no more violate a contract made by themselves or under their authority than they can rescind or alter or impair the obligation of one made between private individuals."

And the judgment dismissing the indictment was affirmed.

State vs. Morrow, 26 Mo., 131, decided in 1857, maintained the same doctrine. In the case of *The State of Missouri vs. Miller*, 50 Mo., 132, the facts appeared as follows:

The appellant had been convicted in the lower court for selling lottery tickets in the Missouri State lottery for the benefit of the town of New Franklin, the same lottery involved in the case of *The State vs. Morrow*, cited above. In the other cases, acts of the General Assembly had been passed repealing the lottery or inflicting penalties for operating a lottery in the State; but, when the Miller case was tried, there had been a new constitution adopted by the State of Missouri, by which lotteries in the State were prohibited. And the court upon this question said:

"Where a contract, when made, is valid by the laws of the State as then expounded by the departments of the Government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the legislature or decision of its courts altering the construction of the law. The establishment and continuance of a lottery is doubtless an evil, but its abolishment by throwing down the legal barriers which have been built up for the protection of the citizen and his property would be a still greater evil."

And the court held that the question had been conclusively settled in the cases of Hawthorn and Morrow, and ordered the discharge of the defendant. This opinion was delivered in 1872.

The next case is that of *The State of Missouri vs. Miller*, 66 Mo., 329 to 347, which was precisely like the case at bar, except that the provision embodied in the new constitution of Missouri, adopted in 1865, was more comprehensive in its terms than section 226 of our present constitution, the language of the Missouri constitution being:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift-enterprise tickets in any scheme in the nature of a lottery in this State, and all acts or parts of acts heretofore passed by the legislature of this State authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby repealed."

The attorney general of the State filed a proceeding in the nature of a *quo warranto* in behalf of the State to oust the defendants from exercising the franchise of operating the lottery for the benefit of the town of New Franklin (referred to in the other cases), and the defendants answered and claimed that by virtue of a contract made on the first of June, 1842, by Gregory with the trustees of the town of New Franklin, and the modification thereof made on the eleventh of April, 1849, they were authorized to enjoy the privilege of selling tickets and conducting the lottery until the year 1877, having acquired by purchase from the representatives of said Gregory all the rights accruing to him under said contract.

The act incorporating the town of New Franklin granted the right to its trustees to raise by lottery the sum of fifteen

thousand dollars for the purpose of building a railroad from said town to the Missouri river, and in 1835 the General Assembly authorized the sale of the lottery privilege.

The lower court decided against Miller. The supreme court, Judge Norton delivering the opinion, said:

"Anterior to the adoption of the constitution of 1865, there was nothing in the organic law prohibiting the legislature from establishing lotteries. Until then they had the right to pass laws authorizing or forbidding the sales of lottery tickets. Under the constitution of 1820 the General Assembly had the power to authorize the town of New Franklin, through its trustees, to raise money by way of lottery, and this we understand to be conceded; nor is it denied that the act of 1835, empowering the said trustees to contract with any other person for the drawing of the lottery, was a legitimate exercise of legislative power."

The court said further:

"The contract of 1849 was so made because by the act of 1833 the town of New Franklin became a public, as contradistinguished from a private, corporation, and such public corporations are called into being at the pleasure of the State, and neither the charter nor act of incorporation is in any sense a contract between the State and the corporation. The same voice which speaks them into existence may speak them out. Such corporations are the auxiliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privilege or their existence upon anything like a contract between them and the legislature. When the State, however, does create such agency, and through it contracts with a third person, whereby rights become vested in such person, it is then beyond its power to divest them, for such contract is *pro hac vice* the contract of the State, the obligation of which it cannot impair without trampling under foot that provision of

the Constitution which declares that no State shall pass any law impairing the obligation of a contract; and if such agency make a contract with a third person touching a subject in reference to which the State has authorized it to contract, and such contract is imperfectly made, it is within the power of the State to validate it."

Again, on page 344:

"So long as the power conferred by the act of 1835 upon the trustees to contract with other persons for drawing and managing said lottery remains unexecuted by them, the State, through its legislature, could have taken from the town of New Franklin the right to raise money in that way, such right being a mere bounty, subject to recall or repeal without such repealing law being obnoxious to the prohibition against the passage of a law impairing the obligation of contracts. When, however, this power is executed and a contract concluded, whereby a third person acquires the right to conduct and manage a lottery, another and different question is presented and the rights thus acquired become vested by the act of the State and cannot be taken away, except by the terms of the contract."

And the court concluded by saying:

"We have been driven to our conclusions by former adjudications of this court, the correctness of which we do not question. As to the impolicy of the act of the General Assembly in granting the privileges it did to the town of New Franklin, whereby the sale of lottery tickets has for years been authorized, against the sense of the people of the State and to the debauchery of the public morals, we have nothing to say; nor have we anything to do with the fact that the trustees in making the Gregory contracts and the legislature in ratifying them have acted unwisely, and continued till the year 1877 a business yielding large profits

and gains to one contracting party and comparatively small to the other. We are to look to the contract, and if fairly made, uncorrupted by fraud and untainted by illegal considerations, it is our duty to enforce and uphold the legal rights which it confers. Security to the rights of person and property demands a strict adherence to this rule, and it cannot be overleaped, even though the purpose be to correct either a supposed or really great evil."

In all the cases cited, the questions involved were identical with the questions now under consideration. They all related to grants of lottery privileges and sales made under authority of the State, and the courts of all the States named unanimously held that, where a contract had been made relative to such a franchise by a third party with the original grantee under the authority of the State, such third party became the owner of a vested right of property, which could not be divested by subsequent legislation or constitutional ordinance; and we do not think a single case from any State can be produced deciding otherwise.

In Kentucky the decisions have been uniform upon this subject until the present case arose. The first case decided by the court of appeals involving a lottery franchise was *McIrane et al. vs. Holmes et al.*, Sneed's Report, p. 377. The court held the act of the legislature, which interfered with the operation of the lottery, was unconstitutional. This was the first decision of the court of appeals which adjudged an act of the General Assembly to be unconstitutional, and was delivered in May, 1804; it was followed by *Gregory, executrix, vs. Trustees of Shelby College Lottery*, 2 Metcalf, 589. The litigation in this last-cited case arose under an act of the General Assembly of the State

of Kentucky, passed in February, 1838, conferring upon the Shelby College a lottery privilege to raise a sum of money not exceeding one hundred thousand dollars. By the third section of the act the managers were authorized to sell and dispose of the scheme or any classes of said lottery upon the execution by the purchaser of a bond. Under this authority the franchise was sold to one Gregory. In the meantime, after the death of all the managers named in the act granting the lottery privilege, William I. Waller, an Episcopal clergyman, who had advanced money upon the faith of the lottery grant, brought his petition, claiming to be entitled to the benefits resulting from the lottery privilege, and asked the court to appoint other persons as managers to control and dispose of it and render it profitable. The circuit court appointed other persons to act as managers, and an appeal was taken, and it appeared to the satisfaction of the appellate court, as it did to the circuit court, that the contract entered into between Gregory and the managers of the Shelby grant had not been made according to the provisions of that act, and was, therefore, insufficient to confer upon him (Gregory) the franchise which was conferred upon the managers, and which they were authorized to sell; but Waller having loaned money, he was held to have the rights of a mortgagee and entitled to a lien upon the grant and a right to operate the same until he was reimbursed the money thus advanced, and this right, it was held, could not be affected by the provisions of the Revised Statutes by which all lottery grants were to cease and determine three years after the adoption of the revision. The Revised Statutes went into effect July 1, 1852, and the repeal took effect, therefore, on July 1, 1855. The court of appeals,

in delivering its opinion through Chief Justice Simpson, said (p. 671):

"It was provided by the Revised Statutes that at the expiration of three years after the revision took effect all rights and privileges which had been granted by the legislature of this Commonwealth to raise by lottery money for any purpose should cease and determine. The grant of a privilege to raise money by a lottery is a mere gratuity. It is not an act of incorporation; it confers no charter rights, nor does it amount to a contract. The power of the legislature to repeal the grant, and thereby withdraw the privilege, where no rights have been acquired under the act by which it was created, nor any liability incurred in consequence of its passage, is, therefore, clear and unquestionable.

"It was said by this Court in the case of *Covington and Lexington Railroad Company vs. Kenton County Court*, 12 B. Mon., 147, that it cannot be denied the legislature possesses the power and the right to take away by statute what has been given by statute, unless rights have been vested under the law before its repeal. If the legislature delegate an authority it can certainly be revoked before the power has been exercised in such a manner as to create a vested right.

"A repeal of a statute necessarily terminates all proceedings under that statute, unless rights have accrued under it which cannot be legally divested.

"It was, therefore, held in that case that the legislature had the power to repeal an act to amend the charter of the railroad company by which a mere privilege only was conferred, and that the repealing act having been passed before any rights had been acquired under the amendment, it was not unconstitutional. Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued under it, and though lotteries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community,

and for this reason have been almost universally denounced by the law-making power in the different States of the Union, *yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant*, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then to the extent of such rights, at least, the law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following adjudged cases: *Dartmouth College vs. Woodward*, 4 Wheat., 518 to 643; *Fletcher vs. Peck*, 9 Cranch, 88; *University of Maryland vs. Williams*, 9 Gill & Johnson, 365; *Berry vs. Taylor*, 9 Cranch, 52; *City of Louisville vs. University of Louisville*, 16 B. Mon., 642.

"The plaintiff, Waller, before the repealing act was passed, had, on the faith of the lottery grant, advanced large sums of money which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of the Shelby College, and the money was advanced by Waller with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he becomes thereby invested with the right to the use of the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right of which he could not be divested by an act of the legislature. So far, therefore, as the repealing act interferes with or affects this right, it is unconstitutional and inoperative."

This decision has been followed in nearly all the cases decided in this country, involving the question, since it was rendered. It followed the rule laid down in the case of *Bass vs. The Mayor of Nashville, supra*, and the other cases

decided before 1859; it laid down the same doctrine substantially that was stated by this Court in the case of *Stone vs. Mississippi*. The doctrine declared in these cases was recognized, as we will hereafter show, as the law of Kentucky since it was decided, in 1859, until the decision of the case now before this Court. It was so decided after the act of 1838 was passed granting the city of Frankfort the lottery privilege, heretofore referred to, and after the grant to the Henry College lottery, passed in 1850, and it was as firmly established as any other rule of property in the State.

In the case of the Public Library of Kentucky, decided by the court of appeals November 1, 1877, Judge Lindsay delivered the opinion of the court and held the act incorporating the public library of Kentucky to be valid legislation, and that, pursuant to a contract entered into with the library company, Thomas E. Bramlette, ex-governor of the State, and his associates had the right to five drawings by way of lottery. The action was brought by Little and others, who had purchased five hundred dollars' worth of tickets for the fifth and last drawing or entertainment, claiming that the entertainments and distribution of prizes were frauds on the act of incorporation, and sought to recover the money paid by them for tickets. The court said:

"The material facts stated in the petition, excluding all the irrelevant matter pleaded, support the averment that the distribution of prizes at the fifth and last drawing was in the nature of a lottery, and, if appellees are correct in their construction of the grant, was manifestly in excess of the power and privileges delegated to the corporation. That the grant to the library was in the nature of a lottery privilege is perfectly clear, and when its object and purpose are considered it is difficult, if not impossible, to say that the legislature

intended to limit the sales of tickets to entertainments to persons who in good faith expected to attend them, and to prohibit the distribution of prizes to any other than such of the patrons as should actually be in attendance. A great public library was established, which, in the language of the act of incorporation, is to be forever free to the gratuitous use and enjoyment of every citizen of the State of Kentucky, and of all good citizens of every State in the Union who shall comply with the rules and regulations made by the trustees. . . . That the legislature intended to confer lottery privileges on the corporation does not admit of question. The grant is clear and explicit and unmistakable, and the sole inquiry presented by this case is whether the five distributions of prizes or gifts were to be proportioned to the purpose declared in the preamble of the act, or limited and restricted by the inference arising from the time, place, and circumstances at and under which each distribution was to be made. There is no express limitation in the grant as to the sums of money to be raised by the lottery privilege, nor as to the number or prices of the tickets to be issued and sold for the several entertainments, nor as to the amounts to be distributed in the way of prizes."

Again, the court said:

"An exceptional right, like that of a lottery privilege, will never be raised by implication or construction; but when, as in this case, the grant is expressly made, it becomes a delicate matter for the courts to imply limitations, not in terms expressed by the legislature, in order to protect the public morals or prevent the grantee from reaping benefit of a fraud supposed to have been practiced on the law-makers. It is the duty of the courts to ascertain, if possible, the legislative law, and to uphold and enforce it inside of constitutional limitations, without regard to policy of the legislature or the motive of the legislators. It may be proper, in construing an act of the legislature, to look to its effects and conse-

quences when its provisions are ambiguous or the legislative intention doubtful; but when the law is clear and explicit and its provisions are susceptible of but one interpretation, its consequences of evil can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action. The effect and consequence of this lottery grant were undoubtedly to promote the spirit of gambling, and thus debauch the public morals; but the grant being clear and unmistakable, the duty arising on the judiciary is to determine whether the legislature intended the privilege to be exercised within certain implied limitations or to be upon a scale sufficiently extended to secure the establishment of the free library on a permanent, self-sustaining basis."

And the court held that the limitation upon the ground contended for did not exist, and concluded the opinion by saying:

"The object and intention of the legislature were not only plainly manifested by the general provisions of the act, but are expressly declared by the preamble, and the means devised to secure the success of the public charity cannot be impaired by judicial construction, however objectionable they may be. The responsibility for the evils resulting from legislation like this rests with the law-makers and not with the courts. It is neither their duty nor their right to undertake to correct or limit such evils by encroaching on the exclusive domain of legislative power. The lottery grant is not void by reason of the provisions of section 37, article 2, of the State constitution. It is a legitimate, although it may be an objectionable, mode by which to raise the funds necessary to establish the free library. In view of these conclusions we cannot decide that the fifth and last drawing or distribution of the prizes by the library and its agents was unauthorized and illegal. We need not determine whether the contract between the library and Bramlette was or not

judicious or proper, nor whether the trustees have misapplied or misappropriated the profits arising out of the exercise of the lottery grant. These are matters in which these appellees have no interest."

It will be seen from this case that, though the lottery grant was obtained in behalf of the public library of Kentucky by practicing a fraud upon the General Assembly, and there was danger of the proceeds being diverted, yet the court recognized its validity and the efficacy of contracts made under it and refused by construction to place a limitation upon the grant, recognizing in its fullest sense the right of the General Assembly to grant lottery privileges and to authorize contracts thereunder, adopting the true rule that the judiciary construes a law according to its letter and spirit, without regard to the policy or impolicy of the legislation.

On February 11, 1878, the case of J. N. Webb against the Commonwealth was decided by the Court. The facts as stated in the opinion were:

"By an act of the legislature approved December 9, 1850, the appellants, J. N. Webb, etc., were authorized to raise by lottery for the Henry Academy and Henry Female College a sum not to exceed fifty thousand dollars, the trustees to execute bond in the sum of one hundred thousand dollars, to be approved by the Henry county court. The third section empowered them to sell the scheme or any class thereof, but before the vendees are permitted to have a drawing of the lottery they are required to give bond to comply with the provisions of this act, and to file the same in the Henry county court. The Commonwealth, by attorney general, filed in the Franklin circuit court a petition against the appellants and S. T. Dickinson, Z. E. Simmons, and others as

vendees of said managers, in which it is sought to perpetually enjoin them from using the grant. A general and special demurrer to the petition was overruled, and appellants answering, the demurrer to their answer was sustained and judgment entered in conformity with the prayer of the petition. The petition shows that the managers, December 9, 1850, sold to William Gregory the exclusive right to operate the lottery for the sum of fifty thousand dollars, to be paid in annual installments of one thousand dollars each, and that under the contract the sum of twenty-three thousand five hundred dollars has been paid to the managers for the purpose mentioned in the act. Gregory assigned his interest in the grant to Simmons, which was ratified by the managers.

"It is contended by the Commonwealth that section 6, article 21, chapter 28, of the Revised Statutes repealed the act under which appellants claimed. That section reads as follows: 'Three years after this chapter takes effect, all rights and privileges which may have been granted by the legislature of this Commonwealth, to raise money by lottery for any purpose, shall cease and terminate.' The Revised Statutes went into effect on the first day of July, 1852, and this section became operative on the first day of July, 1855. As the managers sold the right to Gregory on the nineteenth of December, 1850, and he regularly paid the annual installments of one thousand dollars to the managers for the use specified in the act, we are of the opinion that Gregory, before the adoption of the Revised Statutes, had acquired such rights under and upon the faith of the act of December 9, 1850, that the attempted repeal cannot affect him or his assignees. In the case of *Gregory vs. The Trustees of Shelby College Lottery*, 2 Met., 598, this Court said:

"'If rights have been acquired or liabilities incurred upon the faith of the privileges conferred by the grant, it would be obviously unjust to permit such rights to be divested by the legislative revocation of the privilege. If, therefore,

vested rights had been acquired under the present grant before the passage of the repealing law, then to the extent of such rights, at least, that law must be regarded as unconstitutional and inoperative. It seems clear that the execution of this contract and the compliance on the part of Gregory gives him and his assignees a vested right to use the franchise to reimburse themselves to the extent of their obligations.'"

And the court, speaking through Judge Hines, concluded by reversing the case, with directions to dismiss the petition.

This case was followed by *The Commonwealth vs. Douglas*, decided November 25, 1882, after the decision of *Stone vs. Mississippi* was rendered by this Court, which was presented to the Court upon the argument; and it was decided after the act of 1878 had been passed repealing all lottery grants in the State. The Court in delivering the opinion said:

"The opinion of this Court in the case of *J. N. Webb vs. Commonwealth*, delivered September 11, 1878, is conclusive of the principal questions raised in this case. That case was between the same parties in interest here, was decided upon its merits on facts admitted in the pleadings, and established the following proposition as the law applicable to the lottery grant approved December 9, 1850, authorizing the raising of fifty thousand dollars for the benefit of Henry Academy and Henry Female College.

"*First.* That the grant was not repealed by the Revised Statutes which went into effect July 1, 1852.

"*Second.* That the transfer to Gregory by the trustees and by Gregory to Simmons and Dickinson vested in the latter the right to raise by lottery the sum of fifty thousand dollars.

"*Third.* That there has been no use made of the franchise up to the fourteenth of February, 1877, the time at which the pleadings were completed in the Webb case, and therefore no question of exhaustion prior to that time could arise.

"The instructions of the court below and the ruling of the court in the admission and rejection of evidence were in conformity to the three propositions stated, and therefore no error was committed to the prejudice of the Commonwealth. Judgment affirmed."

That was an indictment against J. J. Douglas, the present plaintiff in error, found by the grand jury of the Jefferson circuit court at the November term, 1879, charging him with selling lottery tickets contrary to the act of the General Assembly. Douglas gave in evidence the grant of 1850 for the benefit of Henry County College, the transfer to Gregory, and claimed the right to operate the lottery by contract through Gregory and his assignees. His position was sustained, the court holding that a vested right in the lottery franchise had been obtained by Webb, Gregory, and others which could not be divested by legislative repeal.

The next decision, in point of time, was in the case of *Commonwealth vs. Whipps*, decided May 18, 1882, reported in 80 Ky., page 269. The facts in that case were briefly these:

Whipps was authorized by act of the General Assembly, passed in 1880, to dispose of the Willard Hotel property, in Louisville, by way of lottery, for the purpose of paying off his debts, and certain persons were named as managers for the protection of the creditors, who were to be the beneficiaries of the receipts arising from the net earnings of the lottery. Whipps proceeded to advertise his drawing and sell tickets therein. He was indicted in the Jefferson circuit court, and upon the trial the indictment was dismissed; from which judgment an appeal was taken to the court of appeals. The court, among other things, said:

"Lottery grants are now in existence in this State, and their constitutionality has never been denied, nor can the

theory of counsel be maintained, that their validity is upheld by reason of, or in consideration of, public service. There is no more obligation on the State, through its legislature, to maintain a public school at Frankfort than there is to pay the debts of appellee; and, if so, why grant a lottery privilege to the one college and deny the right to a like college located in a different locality? It is conferring a privilege on one and withholding it from the other. These are, in fact, mere special privileges acquired under legislative grant for the advancement of private or local interests, that in no manner violates the rights of others, and neither grant can be said to have been made in consideration of public service. *The motive prompting the legislature to make the grant cannot be inquired into by this court.* 'Plenary power in the legislature for all purposes of civil government is the rule,' with uncontrolled authority in making the laws within the limits of the constitution. This court has nothing to do with the moral question involved; if it had, the case could be easily disposed of. 'The legislature makes, the executive executes, and the judiciary construes the law.' As an additional argument in favor of the constitutionality of the measure is the practical construction placed upon this section of the bill of rights by the constant legislation of the State conferring special privileges since the formation of the State constitution. 'When such is the fact,' says Cooley, 'a strong presumption exists that the construction rightly interprets the intention; and besides,' says the same author, 'where the question of construction, after all the investigation given the subject, remains a matter of doubt, it is clear that the court should abstain from deciding it unconstitutional.' The appellee, Whipps, was involved in debt, and the legislature, upon his application, granted him the privilege of selling his property by lottery at a single drawing, the proceeds to be applied to the payment of this indebtedness. The extent of the grant and the power conferred by it is not questioned. The Commonwealth, after making the grant, has indicted him for proceeding under it, and is insisting that he shall

be fined in the sum not exceeding ten thousand dollars for promoting a lottery. No other party is complaining, and the citizen, by reason of the grant, deprived of no right he had when the grant was made. Can this penalty be enforced? And is the act unconstitutional? Both questions must be answered in the negative, and the judgment below is therefore affirmed."

As late as 1888, the grant in this case was upheld as a property right in an action brought in the Louisville law and equity court by *Lawrence vs. Simmons & Dickinson*, alleging that he had acquired an interest in the operation of the lottery in controversy in this case through Stewart, and that Simmons & Dickinson were operating it without accounting to him for his part of the profits, and prayed that they be compelled to account to him for his portion of the profits. Upon appeal the court said:

"If the facts alleged in the petition filed by the appellant are true, and they must be so regarded on the demurrer, we perceive no reason why he is not entitled to relief. The lottery franchise was sold or transferred under and by virtue of a legislative enactment of the city of Frankfort to E. S. Stewart, who became the sole owner, and Stewart afterwards transferred two one-hundredths interest to Reamer, who transferred the same through Stewart to Lawrence, the appellant," and after stating the prayer in the petition, the court says: "The validity of the franchise or the right of the defendants to further operate the lottery are not involved on the appeal, but the simple question presented is, Will the appellant under the transfer be permitted to participate in the profits?"

This brings us to the decision in the case of *The Commonwealth vs. City of Frankfort*, upon which the plaintiff in error bases his plea of *res adjudicata*.

The opinion of the court was as follows:

"In 1878 the attorney general of the State filed a petition in the name of the appellant, in which it is charged that the board of councilmen of the city of Frankfort claimed that it had an unexhausted legislative privilege to raise large sums of money by running and operating a lottery for the benefit of the city school of Frankfort. It is further charged that the board of councilmen of the city of Frankfort claim that by legislative authority it had the authority to sell and transfer the lottery privileges, and that in 1875 it did undertake to sell and convey to one Stewart its pretended lottery franchises and privileges, and that Stewart has sold to others, who are engaged in selling lottery tickets, etc., and that appellee Pepper and others, under the name and style of the 'Kentucky Cash Distribution Company,' proposed to have a grand drawing of prizes on the first of August, 1876. It is further charged that Pepper and others have advertised this drawing extensively, and are engaged in the sale of tickets by thousands, at twelve dollars for a whole ticket, six dollars for a half ticket, and at the same ratio for a smaller fraction of a ticket, and that they propose a distribution of several hundred thousand dollars to the lucky drawers of prizes. It is further charged that in 1838 the legislature of this State authorized one hundred thousand dollars to be raised by way of lottery, to be expended for the benefit of the city school of Frankfort, and for the erection of proper machinery by which to supply the city with water to be conveyed from Cove Spring. It is, however, charged that the amount authorized to be raised by the act of 1838 has long since been received by the proper city authorities, and that the attempted sale by the city and the exercise of lottery privileges by its pretended vendees are without authority of law and injurious to public morals by tempting the people into the immoral practice of gaming. The appellant made the councilmen of the city of Frankfort, the city school trustees, and Stewart and others defendants, and asked

the court to enjoin the defendants from proceeding further to sell tickets and operate the lottery privileges claimed by them, and finally the court was asked to cancel, annul, and adjudge void the privileges claimed by the appellees. The defendants demurred to the appellant's petition. The court overruled the demurrers, except so far as the suit sought to affect the rights of the parties under and by virtue of the act of 1838; but, on the refusal of the attorney general to make the board of managers of the lottery privilege granted in 1838 parties, the suit was dismissed, so far as it affected defendants' rights under that act. This is an ordinary action brought to prevent the usurpation of a pretended franchise and is authorized by section 529 of the former Code of Practice, as was decided by this Court in the case of *Commonwealth vs. The City of Frankfort and others*, 13 Bush., 186. The board of councilmen answered the petition of appellant and asserted its right to operate a lottery by legislative grant for the support of the city schools of Frankfort, and the other defendants claimed as beneficiaries or vendees of the said board of councilmen. On hearing, the lower court dismissed appellant's petition, and that judgment is here for revision. On the first day of February, 1838, the legislature by its enactment vested in a board of managers the right to raise, by way of lottery, one hundred thousand dollars in one or more classes, as to them might seem proper. One half of this sum was to be appropriated 'to the use and benefit of a city school in the town of Frankfort, and the other half for the construction of such reservoirs, pipes, and conductors as may be necessary and proper to convey the water from the Cove Spring into said town.' The second section provides that the managers shall not reserve more than 20 per cent. of the prizes, and the fourth section authorizes the managers to dispose of the entire lottery scheme or any classes thereof for not less than 10 per cent. of the prizes proposed to be drawn. On the 16th of March, 1869, the legislature passed an act entitled 'An

act to amend and reduce into one the several acts in relation to the city of Frankfort.'"

This is the same act set forth in the petition in this case.

The court proceeds to say:

"And by an act approved March 28, 1872, the board of councilmen of the city of Frankfort were authorized to sell and transfer all property or franchises belonging to the city, and by these several acts it is claimed that the board of councilmen have a clear legislative grant of the right to raise one hundred thousand dollars by way of lottery, and that neither they nor their vendees can be operating or running a lottery in violation of law til' he authorized sum has been raised, which has not been d[illegible]." . . .

The act of March 2[illegible], 1872, is the same one under which the plaintiff in error acquired his rights in this case.

The court further said:

"We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers, and authority equal or exactly similar to those that had by the act of 1838 been conferred on the managers, which include the privilege of raising one hundred thousand dollars by operating a lottery."

And the court, upholding the act of 1869, decided that it created a separate and distinct new lottery grant, equal to or identical with that conferred upon the trustees or managers under the act of 1838 to the city of Frankfort; that the act of 1872, authorizing the sale and transfer, was valid, and that the sale to Stewart was made in conformity therewith, and it dismissed the petition of appellant.

It seems to us clear that this decision, rendered in an action brought by the plaintiff in error in this case against

Stewart, under whom the defendant in error claims, upon the identical grant in dispute in this case, is conclusive as to the validity of the grant of 1869, its construction and effect, as well as the scope and effect of the act of 1872, and of the contracts made thereunder.

We do not dispute the proposition made by the able judge of the law and equity court, that the plea of *res adjudicata* in a proceeding against a party charged with the usurpation of a franchise is not a bar to a subsequent *quo warranto* proceeding based upon supervenient causes; but we submit that the question as to the validity of the grant of 1869 to the city of Frankfort, and of the enabling act of 1872, and the fact of the purchase by E. S. Stewart in strict conformity to the enabling act, the judgment of the court in the case of *Commonwealth vs. City of Frankfort and E. S. Stewart* is conclusive; because there are no supervenient causes which affect any of these questions. A State is as much bound by a judgment as an individual. This proposition is fully settled by the cases of the *Utica Insurance Company vs. Scott*, 8 Cowan, 709; *Hart vs. Harvey*, 32 Barbour, 67; *Hobson, etc., vs. Commonwealth*, 2 Duvall, Ky., 172; Angell & Ames, Corporations, sec. —, 10th ed. If such changes had taken place since the judgment in that case was announced as would create a new or different cause of action, the plea of *res adjudicata* would not be good; but, upon the questions arising relative to the franchise and contract involved in this case, that judgment is necessarily conclusive.

The rule is stated by Cooley, in his work on Constitutional Limitations, to be:

"A decision once made in a particular controversy by the highest court empowered to pass upon it is conclusive upon

the parties litigant and their privies, and they are not allowed afterward to revive the controversy in a new proceeding for the purpose of raising the same or any other question. The matter in dispute has become *res adjudicata*, a thing definitely settled by judicial decision, and the judgment of the court imports absolute verity. Whatever the question involved, whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same. The controversy has been adjudged; and, once finally passed upon, it is never to be renewed." (Cooley on Constitutional Limitations, p. 58.)

Ever since the Duchess of Kingston's case, 20 St. Tr., 355, this rule has been so firmly established in our jurisprudence that it cannot be the subject of controversy. The only question that can ever arise is as to the application of the rule to the facts of the particular case before the court. The rule itself has been approved and applied in so many cases by this Court that it would be tedious to enumerate them. In a very recent case, *City of New Orleans vs. Citizens' Bank*, decided May 24, 1897, Mr. Justice White, who delivered the opinion of the Court, said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res adjudicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many

decisions of this Court. A brief review of some of the leading cases will make this perfectly clear.

"In *Bank vs. Beverley*, 1 How., 134–139, it was held that a construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In *Tioga R. R. Co. vs. Blossburg, &c., R. R. Co.*, 20 Wall., 137, and *Mason Lumber Co. vs. Buchtel*, 101 U. S., 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes.

"In *Cromwell vs. Sac*, 94 U. S., 353, after a full statement of the nature of the estoppel resulting from the thing adjudged where the demand was the same in both cases, the Court then considered the extent of the estoppel where the causes of action were distinct, and said (p. 853):

"'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.'

"It is unnecessary to multiply citations of authority, as the subject has been quite recently fully considered and passed upon by this Court. In *Last Chance Min. Co. vs. Tyler Min. Co.*, 157 U. S., 687, where an estoppel resulting from the thing adjudged was enforced, this Court said (p. 687):

"'The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to

the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is, therefore, not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided. (*Hopkins vs. Lee*, 6 Wheat., 109; *Smith vs. Kernochen*, 7 How., 198; *Pennington vs. Gibson*, 16 How., 65; *Stockton vs. Ford*, 18 How., 418; *Washington, &c., Steam Packet Co. vs. Sickles*, 24 How., 333; *S. C.*, 5 Wall., 580; *Lessee of Parrish vs. Ferris*, 2 Black, 606; *Cromwell vs. County of Sac*, 94 U. S., 351; *Davis vs. Brown*, 94 U. S., 423; *Russell vs. Place*, 94 U. S., 606; *Campbell vs. Rankin*, 99 U. S., 261; *Lumber Co. vs. Buchtel*, 101 U. S., 638; *Stout vs. Lye*, 103 U. S., 66; *Nesbit vs. Riverside Independent District*, 144 U. S., 610; *Johnson Company vs. Wharton*, 152 U. S., 252.)'

"And the law of Louisiana is exactly in accord with the rulings of this Court, for, as said by the supreme court of Louisiana in *Heroman et al. vs. Louisiana Institute of Deaf and Dumb et al.*, 34 La. An., 814:

"'No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. (Cooley on Const. Lim., p. 47 *et seq.*, and authorities there cited.)'

"'Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to and certain of reversal in a higher court.' (Bigelow Est., 3d ed., Outline, pp. lxi, 29, 57, 103.)

"'The estoppel extends to every material allegation or statement which, having been made on one side and denied

on the other, was at issue in the cause and was determined therein.' (*Aurora vs. West*, 7 Wall., 102; 4 N. Y., 113; 2 An., 462; 14 An., 576; 19 La., 318; 5 N. S., 664; 11 M., 607; 14 La., 233; 5 N. S., 170.)

"It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

Mr. Justice Campbell, in delivering the opinion of this Court in *Jetter vs. Hewitt et al.*, 22 How., 363–'4, said:

"The authority of *res adjudicata* as a medium of proof is acknowledged in the civil code of Louisiana, and its precise effect in the particular case under consideration is ascertained in the statute that allows the proceeding by monition. Under the system of that statute the maintenance of public order, the repose of society, and the quiet of families require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence that commentators upon it have said the *res adjudicata* renders white that which has been black, and straight that which is crooked. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

> See *Com'rs of Sinking Fund vs. Green and Barren River Nav. Co.*, 79 Ky., 75, and also *Barbour vs. City of Louisville*, 83 Ky., 95.

The law of Kentucky is also exactly in accord with the decisions of this Court upon the subject of *res adjudicata*. It has been frequently decided by the court of appeals that the

judgment of a court of competent jurisdiction is not only conclusive of all matters determined by it, but of all incidental matters which might and ought properly to have been then asserted and decided. (See *Snapp vs. Snapp*, 10 Ky. Law R., 600, and cases cited.) This doctrine is recognized by this Court in *Brownsville vs. League*, 129 U. S., 505, in which Mr. Chief Justice Fuller said:

"*Res adjudicata* may make straight that which is crooked, and black that which is white."

In *Dowell vs. Applegate*, 152 U. S., 343, Mr. Justice Harlan, in delivering the opinion of the Court, reviewed the prior decisions upon the question, and said that—

"A judgment by a court of competent jurisdiction as to parties and subject-matter is a finality in respect to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other reasonable matter that might be offered for that purpose."

Johnson & Co. vs. Wharton, 152 U. S., 257.
Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S., 683.
Lessee of Parrish vs. Ferris, 2 Black, 606.
Nation et al. vs. Johnson et al., 24 How., 197.

Applying these principles to the case at bar, the action being between the same parties, plaintiff in error being privy in estate, having purchased the grant from Stewart after the judgment, the issue as to the validity of the grant and contract being the same, the questions now sought to be determined were conclusively determined in that case. No supervenient right in behalf of the State as against the legality

and validity of the contract has arisen or been discovered since the decision. The passage of the act of 1890 and the adoption of the constitutional provisions did not create any new right, but will, if the construction of the Commonwealth be adopted, destroy prior legal rights fixed by the former judgment.

It is alleged in the answer, and admitted to be true upon the demurrer, that, based upon the decisions of the various courts in the United States, and especially the decisions of the Kentucky court of appeals, Douglas acquired his property in the franchise in controversy. After its complete and unqualified recognition by the executive, legislative, and judicial departments of the State government, he in good faith paid large sums of money for the franchise and expended large sums upon it, and created obligations, relying upon the integrity of the State and its various departments of government to uphold the contract rights acquired under a legislative enactment and sanctioned by judicial decisions in the State, without a single exception, for a period of more than thirty years.

The principle of *stare decisis* is nowhere better stated than by Judge Cooley, who, in his work on Constitutional Limitations, says:

"All judgments, however, are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a sub-

sequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable. . . . If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons and upon a clear manifestation of error."

Cooley on Const. Lim., 61.

Citing with approval, by note, numerous cases, especially the case of *Nelson vs. Allen*, 1 Yerg., 376, in which Judge White said:

"Whatever might be my own opinion upon this question, not to assent to its settlement now, after two solemn decisions of this Court, the last made upward of fourteen years ago, and not only no opposing decision, but no attempt even by any case, during all this time, to call the point again in controversy, forming a complete acquiescence, would be, at the least, inconsistent, perhaps mischievous, and uncalled for by a correct discharge of official duty. . . . The most able judges and the greatest names on the bench have held this view of the subject, and occasionally expressed themselves to that effect, either tacitly or openly, intimating that if they had held a part in the first construction they would have been of a different opinion; but the construction having been made, they gave their assent thereto. Thus Lord Ellen-

borough, in 2 East, 302, remarks: 'I think it is better to abide by that determination than to introduce uncertainty into this branch of the law, it being often more important to have the rule settled than to determine what it shall be. I am not, however, convinced by the reasoning of this case, and if the point were new I should think otherwise.' Lord Mansfield, in 1 Burr., 419, says: 'Where solemn determinations, acquiesced under, had settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute.'"

In the case of *Louisiana vs. Pillsbury*, 105 U.S., 297, which was an action to compel the city of New Orleans to levy a tax for the payment of certain coupons on outstanding bonds issued under an act of that State in 1852, the State of Louisiana passed an act postponing the levy and collection of the tax in 1874. In 1876, by an act of the General Assembly, it attempted to repeal the tax, and although the tax was imposed relative to the institution of slavery, and although slavery had been abolished and there were no longer slaves upon whom taxation could be levied, it was held that the obligation of the State to raise the required fund by special tax on real estate remained inviolate. The decision of the Court was rendered in 1881 by Mr. Justice Field, and upon the proposition under discussion he said (page 302):

"Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The

construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States expressed in the same terms is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine of this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglas vs. Pike County*, 101 U. S., 968: 'The true rule (he observes) is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment—that is to say, make it prospective, but not retroactive.' After the statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of legislative enactment." (Citing *Gelpecke vs. Dubuque*, 1 Wall., 175; *Havemeyer vs. Iowa County*, 3 Wall., 294; *Thompson vs. Lee County*, 3 Wall., 327; *Olcott vs. Supervisors*, 16 Wall., 678; *Fairfield vs. Gallatin County*, 100 U. S., 47.)

In the case of *Olcott vs. The Supervisors*, 16 Wall., 690, cited in the foregoing opinion, the Court said:

"This Court has already ruled that if a contract when made was valid under the constitution and laws of the State, as they had been previously expounded by its judicial tribunal and as they were understood at the time, *no subsequent action by the legislature or the judiciary will be regarded by this Court as establishing its invalidity.* (*Havemeyer vs. Iowa City*, 4 Wall., 294; *Gelpecke vs. Dubuque*, 1 Wall., 175; *Ohio Life and*

Trust Co. vs. Debolt, 16 How., 432.) Such a rule is based upon the highest principles of justice. Parties have a right to contract and they do contract, in view of the law as declared to them, when their engagements are formed. Nothing can justify us in holding them to any other rule."

The Court referred to and adopted the language of Chief Justice Taney in the case of *Ohio Life and Trust Co. vs. Debolt*, 16 How., 432, heretofore cited. The doctrine thus broadly announced has been enforced and recognized wherever the question has arisen, so far as we have been able to find upon investigation. The construction of a statute by the highest courts of the State which created it will be followed by the Federal courts, provided such construction is clear and *was made before the facts occurred out of which the question for adjudication arose.*

> See *Allen vs. Massey*, 17 Wall., 354; *Townshend vs. Todd*, 91 U. S., 452; *Scipio vs. Wright*, 101 U. S., 665; *Buchu vs. Railroad Co.*, 125 U. S., 555; *Bacon vs. N. W. L. I. Co.*, 131 U. S., 258; *Equator Co. vs. Hall*, 106 U. S., 86; *Brine vs. Insurance Co.*, 96 U. S., 627.

If a contract is valid by the laws of a State, as then construed by its courts, subsequent decisions altering the construction of the laws will not be followed by the United States courts. (*Douglas vs. Pike Co.*, 101 U. S., 677; *Anderson vs. Santa Anna*, 116 U. S., 356; *Carroll vs. Smith*, 111 U. S., 556.) To the same effect are the cases of *Post vs. Supervisors*, 105 U. S., 667; *Burgess vs. Seligman*, 107 U. S., 20; *Green Co. vs. Corness*, 109 U. S., 105. This Court has declared that "the sound and true rule is that if the contract when made was valid by the laws of the State, as then expounded by all the departments of the government and administered in its

courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation or decision of its courts altering the construction of the law." (*Ohio Life and Trust Co. vs. Debolt*, 16 How., 432; *Gelpecke vs. Dubuque*, 1 Wall., 175–206; *Douglas vs. Pike Co.*, 101 U. S., 677; *Louisiana vs. Pillsbury*, 105 U. S., 278; *Rowan vs. Runnels*, 5 How., 134; *Green vs. Neal*, 6 Pet., 297; *Shelby vs. Gary*, 11 Wheat., 368; *Taylor vs. Ypsilanti*, 105 U. S., 72; *Fairfield vs. County of Gallatin*, 100 U. S., 52.) "A party who acts in accordance with the law as laid down by the highest tribunal in the State, while it is still law, shall not suffer because it is subsequently set aside and another and inconsistent rule substituted for it." (Sutherland on Statute Construction, p. 319.)

We can add nothing to the force of these authorities by argument. The application of the rule of *stare decisis*, as stated by these courts, to the case at bar is simple and conclusive. And this rule has been forcibly stated by the court of appeals of Kentucky in numerous cases, and is a well-settled doctrine of law in that State. Beginning with the case of *South's Heirs vs. Thomas' Heirs*, 7 Monroe, 61, a suit involving a question under the law of descent, etc., the court said (page 61):

"We are all well aware that the courts of England gave the construction contended for by the appellants to their statute, and the Supreme Court of the nation has given the same construction to ours, although differently expressed from the English statute; but this court, in the case of *Machir vs. May*, etc., 4 Bibb, 43, and afterward in the case of *Scutney vs. Overton*, 4 Bibb, 466, has had occasion to notice the different expressions in our statute and consider their effect, and has been compelled to say that, on casting a descent to minors, the bar ceases, and that the expression, or 'coming

to *them*,' means the hour when the action accrues to *them* who are within the savings of the act. . . . It has been often said that it is not so important that the law should be rightly settled as that it should remain stable after it is settled. This is true, for attempts to change the course of judicial decision, under the pretext of correcting error, are like experiments by the quack on the human body."

And in the case of *Tribble vs. Taul*, 7 Monroe, 455, upon the question of regulating courts of equity, it was said:

"If we were convinced that on this point the law was settled wrong originally, we should not feel ourselves at liberty to depart from it, aware that it is of greater importance to society that the rule should be uniform and stable than that it should be the best possible rule that could be adopted. In the supreme court of a State, as this is, possessing, with but few exceptions, appellate judicial power coextensive with the State, the influence which its decisions must have is evident. Its mandates are conclusive, and even its *dicta* are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals, and, as a matter of course, all other decisions conform to it. If in this court a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals, and even the credit and respect due to this court is shaken by the phenomenon that A has lost his cause on the same ground that B gains his. And not only do these consequences follow, but some still more serious may ensue, for perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications. We ought, therefore, to be cautious not to leave a course well understood, and nothing but the imperious demands of justice could justify it."

And the court held that, as the principle under discussion had been decided and recognized by the court for nearly

twenty years, it would not depart from it. Nowhere is this doctrine stated with greater vigor of language than by the court of appeals in the well-considered case of *Franklin County Court vs. Louisville & Nashville Railroad Company*, 84 Ky., decided in 1886. It that case there was an effort on the part of Franklin county to compel the Louisville and Nashville railroad to pay a tax upon the assessment of so much of its road as was located in Franklin county and a proper proportion of its rolling stock. The suit was brought to enjoin the county from levying the tax upon the ground that it had been previously held that this special part of the road was exempt from local taxation, and the court said:

"It is a part of the general jurisdiction of the chancellor, as held by this court in the case of the *L. & N. R. R. Company vs. Warren County Court*, 5 Bush., 243, to stay by injunction illegal proceedings to assess and sell property for taxes. Numerous grounds are urged in this instance why it should be done, but it is only necessary to consider one of them. Prior to the act of March 17, 1876 (*vide* General Statutes, page 881), our statute did not expressly provide, either as to county or State taxation, that *all* property, save that specifically exempted, should be liable.

"Undoubtedly, however, this is the general rule, and the exemption is the exception. Inequality of taxation, whether local or general, is inconsistent under a government where all share alike its benefits, and should therefore bear the burdens equally. The power of taxation is necessary to governmental existence, and every person or corporation protected by it should contribute his or its just proportion to its support. This is obviously true as to the local as well as the State government. All are interested in the purposes which render county or local taxation necessary. These general views have often been announced from this bench, and are beyond dispute.

"This court, however, decided in 1868—which is the very year from which the claim of the appellant dates—in the case of *Applegate, etc., vs. Ernst, etc.*, 3 Bush., 648, that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety, and liable in its consolidated character for State revenue only.

"This case was followed by that of *L. & N. R. R. Co. vs. Warren County Court, supra*, to the same effect, and this remained the law of the State, as declared by its highest judicial tribunal, during all the years covered by the tax claim of the appellant.

"The legislature, knowing that no statute existed expressly declaring that *all* property should be liable for county taxation, save that specifically exempted, and recognizing the law to be as announced by its court of dernier resort, on March 17, 1876, passed an act providing that *all* the property in a county not specially exempted by law should be liable for any county *ad valorem* tax, and that all the property of any railroad company and that of various other kinds of corporations therein named should be assessed for such purpose.

"It may therefore be said that the non-assessment of the appellee during the years for which taxes are now claimed was recognized as proper by both judicial decision and legislative action. This court, as now organized, fails to recognize any sufficient reason why that portion of a railroad within a county should not have been held liable for county taxes is prior to the legislative declaration in the act of 1876. It shared in the protection and advantages afforded by the local government. Its liability for its proper proportion of the expense incident thereto would not at most necessarily have impeded its proper use by either the owner or the public, and the fundamental rule of at least approximate equality of taxation, it seems to us, should have been applied to it. *The law, however, as then declared and recognized, was otherwise.* The acts of the legislature relating to Franklin county of January 9, 1868, and March 16, 1869, did not alter it as to

this particular county, because the taxation thereby authorized was upon all 'the taxable property' of the county, and it must be considered that the legislature had in view only such property as was then taxable under the then law as declared by this court. The appellee did all that was then required of it as to listing its property or paying its taxes. No demand was made of it to do more, or for the tax now claimed, for a period ranging from eight to fifteen years from the time when it accrued. . . .

"From 1868 to 1875, inclusive, it was, however, the law, as declared by this court, that the road of the appellee was not taxable for county purposes. There was no express statutory provision to the contrary. Rights were acquired and duties performed in accordance with the then law as announced and understood, and in the absence of an express statute to the contrary the then construction of the law must be held to be *the* law governing the acquisition of rights or the performance of duties of that period.

"It is well settled that if a contract be valid under the law, as previously expounded by the courts and as understood at the time, no subsequent judicial action will render it invalid. Parties have the right to and do contract with a view to the then law as declared."

It will be observed that this case decides the two most important questions involved in this action:

First. It sustains to the full extent the doctrine of *stare decisis*, and adjudges that where a right under a contract or statute has been adjudged one way for a period of seven years *only*, the decisions of the court constituted a rule of property governing the action of the people, and cannot be departed from subsequently, even though the court might be unanimously of the opinion that the former decisions were wrong.

Second. It reaffirmed the proposition that if a contract be valid under the law as expounded by the courts when it was

made, no subsequent judicial action can render it invalid; from which it follows,

Third. That the act of 1890 and section 226 of the constitution must be construed as applying only to a charter franchise where no contract rights had accrued, and cannot affect rights acquired under a lawful contract made while the charter or grant was in full force.

The court of appeals held, in the case of *Franklin County Court vs. Deposit Bank of Frankfort*, 87 Ky., 380, that—

"The State of Kentucky, in the management and control of her affairs, in her relation to the other States, and in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States to the Federal Government or are denied to the States, is sovereign by right. It is by virtue of her sovereignty that she has the power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the State makes contracts with individuals; that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign.

"Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contracting, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration coming to him from the other party to the contract, he surrenders something and receives something in its stead which he deems an equivalent. Whether the one or the other has, in fact, received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value and deemed by him to be an equivalent is all that is required to make the contract irrevocably binding. In thus contract-

ing, *he does not surrender his sovereign power; he merely exercises it.* Upon precisely the same principle the Commonwealth contracts. If her contract is without any valuable consideration, it is a *nudum pactum;* so is that of the citizen; but if there is a valuable consideration to support, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State, possessing the power to make, for a valuable consideration, a binding contract, falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts she stands upon precisely the same footing that individuals do in reference to their contracts—she shall pass no law impairing their obligation."

In *Mattox et al. vs. Graham and Knox*, 2 Met., 85, the court of appeals of Kentucky said:

"We cannot esteem it otherwise than an imperative duty to dispose of the constitutional question thus raised in very brief time. In this court it is not now a question open to argument. It is one which has been formerly before the court, was thoroughly argued, maturely considered, and was solemnly and authoritatively decided. It was not a similar question arising in a case somewhat analogous to this, but it was identically the same question—the constitutionality of the very laws now brought to the consideration of the court.

"In the language of the supreme court of Pennsylvania in the case of *The Commonwealth*, by Thomas, *vs. The Commissioners of Allegheny County*, we say: 'The question should be at rest. We cannot agree with the counsel that because it is a constitutional question it should be treated as always open. Where the meaning of the constitution on a doubtful question has been once carefully considered and judicially de-

cided, the instrument is to be received in that sense and every reason is in favor of a steady adherence to the authoritative interpretation.' In the supreme court of Pennsylvania, when the case of *Sharpless vs. The City of Philadelphia*, which involved a constitutional question like this, was before that court, two judges dissented from the opinion of the court, which was in favor of the constitutionality of the law; and yet, when a similar question was presented to the court in the case of *The Commonwealth vs. The Commissioners of Allegheny County*, the court felt bound by the decision in the Sharpless case.

"And in this case there are even stronger reasons than any which existed in that in favor of the steady adherence to the authoritative interpretation of the constitution given in the Slack case. As said by Judge Lowery in the Allegheny Bond case, 'We have before us now quite another question. In the Slack case it was simply a question of the constitutionality of the law. Now it is a question of the validity of contracts, in which the law is only one of the elements.'"

These decisions show that the doctrine of *stare decisis* and the right of the State to authorize valid sales of lottery privileges have been recognized in Kentucky for more than half a century, and we respectfully submit that it is too late now to reverse the whole current of judicial action and destroy property rights lawfully acquired upon the faith of these deliberate and repeated adjudications.

If this can be done, the citizen certainly holds his rights by a most precarious tenure; not the settled law of the land, but a fluctuating public sentiment, will determine whether he shall or shall not continue to enjoy the benefits of lawful contracts in which he has in good faith invested his money. Surely this is not a propitious time to sanction such a de-

parture from the long-established principles under which the rights of property have heretofore been secured to the people.

But it may be contended that the repeal and revocation relied upon by the defendant in error were authorized by the Kentucky act of 1856, now incorporated in the General Statutes of the State in the following words:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, *no amendment or repeal shall impair other rights previously vested.*" (Chap. 68, sec. 8, p. 862.)

As to the right to repeal the grant itself, either with or without the authority reserved in this statute, there can be no controversy; but the repeal of the grant cannot, either under the statute or upon general principles of law, "impair other rights previously vested."

See *Sinking Fund Com'rs vs. Green and Barren River Nav. Co.*, 79 Ky., 73–83; *Lou. Water Co. vs. Clark*, 143 U. S., 16; *Commonwealth vs. Railroad Co.*, 95 Ky., 75; *Lou. Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 698; *Orr vs. Bracken Co.*, 81 Ky., 593; *Wendover vs. Lexington*, 15 B. Mon., 258.

The act of March 22, 1890, did not purport to do anything more than repeal the grant to the city of Frankfort and the act authorizing the city to sell and transfer the lottery privilege (Record, p. 2). It was in substance and effect the same in all respects as the various repealing acts previously passed, which the highest judicial tribunal in the State had repeat-

edly held did not in any manner affect contracts lawfully made while the grants were in force, and we are bound to assume that the legislature did not intend this repealing act to have any greater or more comprehensive effect than the courts had given to similar statutes in the past. So construed, it was not intended to destroy or impair a valid contract already made, but was designed simply to repeal the grant itself and prevent future contracts. In *Sinking Fund Com'rs vs. Green & Barren River Nav. Co.*, 79 Ky., 73, the court said:

"The charter of the appellee has not been repealed, but only so much of it as relates to the lease, and if there had been a repeal of the charter by reason of the statute of 1856, the provision of the first section of that act, 'that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested,' would secure to the appellee its right under the lease."

This decision was cited and approved by this Court in *Louisville Water Company vs. Clark*, 143 U. S., 16.

In *Commonwealth vs. Essex Co.*, 13 Gray, 239, the Court said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away property rights which have become vested under a legitimate exercise of the powers granted;" and in the case of the Broadway Surface Railroad Company (*People vs. O'Brien et al.*, 111 N. Y., 1–66), the court, after a careful examination of the authorities, decided that "constitutional or statutory powers for the repeal of statutes providing for the creation of corporations or the amendment of charters of corporations do not confer power to take away or destroy property or annul contracts, and an express reservation in such a statute of power to take away or destroy property lawfully acquired, under authority conferred by a char-

ter, or any legislation which authorizes such a result to be accomplished indirectly, is unconstitutional and void."

In *Close vs. Glenwood Cemetery*, 107 U. S., 466, this Court said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any right vested under it, and which the legislature may deem necessary to secure either that object or any public rights." See also Sinking Fund cases (*Union Pac. R. R. Co. vs. United States*, 99 U. S., 700).

The entire clause contained in the constitution is as follows:

"Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and no schemes for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked." (Record, p. 2.)

It is evident that the whole provision, except the last sentence, looks to the future, and is directed to the legislature; it is a limitation upon the power of that body respecting grants of lottery privileges in the future, and an injunction upon it to enforce the section by proper penalties. After having thus apparently completed the section and provided for its enforcement, the framers of the instrument seem to have determined to go a step further and revoke the lottery grants and privileges already existing; but they did not attempt, in terms, to annul any contracts that may have been theretofore lawfully made under such grants, and, in view of the long and uniform course of decisions in the State sus-

taining the validity of such contracts and holding that they could not be destroyed or impaired by a mere repeal or revocation of the grant, it cannot be presumed that the constitutional convention intended, by the language employed, to do anything more than revoke the grants, leaving all contracts, which were lawful when made, in full force, according to the established rule of the courts. If it had been the intention to overthrow, or attempt to overthrow the settled law and policy of the State concerning the inviolability of such contracts, and their exemption from the effects of a statute which simply, in terms, repealed the grant, appropriate language would certainly have been used for that purpose. We are not at liberty to assume that the framers of the organic law of the State were so ignorant of the rules of construction and of constitutional guarantees as to suppose that the words "all lottery privileges or charters heretofore granted are revoked" included lawful contracts previously made between private individuals. The courts had decided again and again, as we have already shown, that such words, or words of similar import, did not include contracts and did not affect them in any manner. The "privileges" and "charters" which are "revoked" are those, and those only, that have been "granted" by the legislature. The contract under which the plaintiff in error claims is not a charter; the privileges he claims were not granted to him or to his vendee; they were acquired by a contract lawfully made, upon a full consideration. The grant was made to the city of Frankfort, and legislative authority was given to the city to sell and transfer the privilege for a valuable consideration, which was done long before the passage of the act of 1890 or the adoption of the constitution; and this identical sale

and transfer had been recognized as valid and binding by the supreme judicial tribunal of the State in a civil proceeding instituted by the State itself for the express purpose of preventing the vendee from exercising the privilege claimed under it. We are bound, under such circumstances, to assume that the constitutional provision means just what it says, and no more, and that its framers knew the legal meaning and effect of the language they employed; and, if so, there was not even an attempt to annul or impair the contract involved in this case.

But the court of appeals, overruling all its previous decisions upon the same question, has given to the legislative act and the constitutional provision a construction which not only impairs, but destroys, the contract, and it is the province of this Court to correct the error and maintain the authority of the Federal Constitution over this important subject. The fact that a lottery privilege is involved in the controversy in no way affects the application of the ordinary rules of law to the case. If, when a repealing act is passed or a constitutional prohibition is adopted, there is a contract in existence which was lawful when it was made, neither the act nor the constitution can destroy or impair it, no matter whether the contract relates to a lottery privilege, a banking privilege, or a right to the title or possession of lands or goods. The fundamental question in all such cases is, whether there was a legal contract in existence at the time of the legislative or other act of the State complained of, and if there was such a contract, whatever may have been its subject-matter, and the legislative or other act impaired its obligation, it is the duty of this Court to enforce the constitutional prohibition and protect the rights of the injured party.

We insist upon the broad doctrine that no State can, in the exercise of its police power or any other power, destroy or impair any right which is secured to the citizen by the Constitution of the United States. Of course, the right must be established, it must be shown that a right exists; and, when that is done, it is secured by the supreme law of the land and must be protected by the Court. The undefined and undefinable attribute of sovereignty known as the "police power" may be sometimes successfully appealed to by the State for the purpose of showing that a binding contract in regard to a particular subject could not be made, but it can never be invoked to destroy or impair the obligations of a contract legally entered into by the State itself or by its citizens. Most assuredly, it cannot be invoked to destroy or impair the obligations of a contract which the State, by the action of all its departments, has again and again declared to be valid and binding and which was entered into by the citizen on the faith of such declarations.

The State is the guardian of its own sovereignty, and whether it can, in the exercise of its sovereign power, make a valid contract concerning a particular matter, or authorize its citizens to make a contract, is a question for it to determine, and, when it has determined that question in the affirmative and the contract has been made, it is binding upon the State or upon the citizen, as the case may be. If the contract made by the State does not affect its relations to the Union or violate any law of the United States, or if the contract made by its citizens under its authority is free from such objections, this Court, in administering the Constitution, cannot say that the transaction was an abandonment or surrender of the State's sovereignty or of its police power, and,

therefore, did not constitute a contract, although having all the forms and all the elements of a contract. If the constitution of a State permits the legislature to authorize a contract, and it does authorize it, and the contract is, in fact, made and rights are vested under it, and all the departments of the State government—legislative, executive, and judicial—through a long series of years, recognize its validity and the validity of like contracts on the same subject, it would be an entirely new and very dangerous application of the doctrine of "police power" to permit the State suddenly to reverse its course and destroy the creatures of its own policy. "The law-maker cannot change his mind to the prejudice of vested rights" is a wholesome maxim of universal application in this country.

The legislative acts granting a lottery privilege to the city of Frankfort and authorizing its sale and transfer were not void; they were both valid as long as they remained in force, and all acts done and contracts made in pursuance of their provisions, while they were in force, are just as lawful and binding now as they were before the repeal of the statutes; and this is true even if the language used in the repealing act and the constitutional provision shall be so construed as to include the contract as well as the grant in the repeal and revocation. If it shall be said that, although the grant was not void, it was revocable at the pleasure of the legislature, and, therefore, the purchaser from the original grantee and all claiming under him took only a revocable privilege, our answer is, that this is the precise question which the court of appeals of Kentucky has decided again and again, as we have shown in this argument. It is the identical question which had been repeatedly decided before the plaintiff in error made

the purchase, and these decisions, according to well-settled principles of law, constituted a part of his contract.

A gratuitous grant of a lottery privilege does not constitute a contract between the State and the grantee, but, where the State authorizes the grantee to sell and transfer the privilege, and he does sell it, the purchaser becomes at once invested with a right of property which cannot be taken away from him without his consent or without making just compensation. By authorizing a sale of the privilege, the State necessarily makes it property in the hands of the purchaser, for it is a palpable contradiction in terms to say that a thing may be legally sold and transferred and to assert, at the same time, that the sale shall not constitute a valid contract or invest the purchaser with title to the thing sold. The reasons which support the authority of the legislature to repeal the original grant, while still in the hands of the grantee, have no application whatever in a case where the privilege has been sold to a third party under legislative authority, and no decision has been found in which the rights of such a party have been disregarded. In the present case, the purchaser claims no contract with the State itself, but his right to protection is founded upon the facts that the State, in the exercise of its sovereign power, has authorized another party to make a contract with him, and that, relying upon the statute and its uniform interpretation by the courts, he has, in good faith, invested his means and incurred obligations on account of the business in which the law invited him to engage for the benefit of the public.

The fundamental question in this case is, whether there was a valid contract in existence at the time of the passage

of the repealing act in 1890 and at the time of the adoption of the constitutional provision in 1891, for, if there was such a contract, the duty of the court to protect it against destruction or impairment by legislation or by judicial construction, is plain and imperative. That there was such a contract, made in good faith by parties competent to enter into it, is conclusively shown, we think, by the acts of the legislature heretofore cited, by the express recognition of the executive and ministerial authorities of the State, and by the repeated and uniform decisions of all its courts, during a long series of years. In addition to these general grounds, which would be more than sufficient to sustain our contention in any ordinary case, the validity of the identical grant and contract upon which the plaintiff in error relies has been judicially declared in a proceeding instituted by the defendant in error in its own courts against his vendor for the express purpose of preventing the use of this franchise. While we do not believe the act of 1890 or the constitutional provision of 1891 should be so construed as to repeal or annul anything except the grant itself, leaving all contracts lawfully made unaffected, yet, if a different construction is to be given them, or either of them, we insist that the doctrines of *stare decisis* and *res adjudicata* are conclusive of this case, and that the contract under which the plaintiff in error claims must be recognized and protected.

Whether the contract was one which the State ought to have authorized is not a question for the consideration of the Court. If the legislature had the constitutional power to authorize it, and did authorize it, and the judicial and other authorities of the State have sustained it, the question of its validity ought not to be open to further discus-

sion. As said by this Court in *Insurance Co. vs. Deholt*, 16 How., 428, quoted and approved in *Butchers' Union vs. Crescent City Co.*, 111 U. S., 746, "it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the power of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions."

We respectfully submit, that the motion to dismiss or affirm as a delay case ought to be overruled, and that the judgment of the court of appeals ought to be reversed.

J. G. Carlisle.

D. W. Sanders,

Aaron Kohn,

For Plaintiff in Error.

APPENDIX.

Judge Pryor, delivering the opinion of the court of appeals, said:

"This character of legislation has been indulged in since the foundation of the State constitution and has met the approval of every department of the State government, and it is now too late to question the exercise of such a power."
Commonwealth *vs.* Whipps, 80 Ky., 277.

The schemes in this lottery are devised and the drawings are conducted according to the "combination and permutation" principle, commonly called the ternary system, which was invented by Joseph Vannini and for which the United States granted him letters patent under the acts passed by Congress "to promote the progress of science and the useful arts." (See Vannini *et al. vs.* Paine, 1 Harrington, (Del.), 65.)

ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY AUTHORIZING LOTTERIES.

"An act authorizing William Littell to have access to the enrolled bills in the office of the secretary of state and for other purposes," approved January 8, 1814. (5 Littell's Laws, p. 75).

Section 2 of the act provides:

"That as soon as the said collection shall have been completed, and so certified by the said Littell, that the edition of the statute law compiled by said Littell, including the fourth volume, lately printed, shall be received in all courts in this Commonwealth, as equal in authority to any printed copies of said laws heretofore in use in this Commonwealth."

Acts in 1st Volume Littell's Laws.

"An act authorizing a lottery," approved December 15, 1792 (1 Littell's Laws, p. 169). This act authorized the

raising of $500 to purchase a lot of ground and erect a church for the Lexington Dutch Presbyterian congregation. (See p. 234.)

"An act authorizing the trustees of Salem Academy to raise a sum of money by lottery," approved December 20, 1792. (1 Littell's Laws, p. 171.)

(Examine act December 19, 1795, p. 327, 1 Littell's Laws.)

"An act authorizing a lottery," approved December 8, 1795 (1 Littell's Laws, p. 359), "for the benefit of the Lexington Lodge of Ancient Masons." (Also see p. 557, Littell's Laws.)

"An act authorizing a lottery" (approved February 27, 1797, 1 Littell's Laws, p. 694), "to raise $1,000 to drain a pond contiguous to Versailles."

2d Littell's Laws.

"An act concerning a lottery in the town of Danville," approved February 3, 1798 (2 Littell's Laws, p. 169), to raise $2,500 by lottery, for the purpose of erecting a school-house and other buildings.

"An act authorizing a lottery in Clarke county," approved February 7, 1798 (2 Littell's Laws, p. 181), for the purpose of erecting a house for a grammar school. All clerks, drawers, and examiners were required to be on oath and a justice of Clarke county was to attend the drawing to see that it was conducted fairly and without fraud.

"An act authorizing a lottery in Bardstown, to raise $2,000 for erecting a house for Salem Academy. All clerks, drawers, and examiners were required to be on oath and a justice of Nelson county to attend the drawings," approved February 7, 1795. (2 Littell's Laws, p. 181.)

"An act to authorize the trustees of Jefferson Seminary to raise a sum of money by lottery," approved December 17, 1798. (2 Littell's Laws, p. 208.)

"An act authorizing a lottery for opening the navigation of the South and Stoner's Fork of Licking," approved December 18, 1798. (2 Littell's Laws, p. 210. See 1 Littell's Laws, pp. 193 and 343.)

"An act to establish and endow certain academies," approved December 22, 1798 (2 Littell's Laws, p. 245), by 2d section thereof authorizes the trustees to raise money by lottery to erect buildings.

"An act to appoint commissioners to settle the account of the managers and trustees of the Lexington Chances of Insurances," approved December 20, 1800. (2 Littell's Laws, p. 427.)

"An act authorizing a lottery in the town of Millersburg," approved December 2, 1801, to promote the lead works. (2 Littell's Laws, p. 491.)

3d Littell's Laws.

"An act repealing Millersburg lottery." (3 Littell's Laws, p. 98.)

N. B.—Chief Justice George Winter was pensioned for life by a general act. (3 Littell's Laws, p. 363.)

"An act authorizing a lottery for the benefit of the Lexington Medical Society," approved December 17, 1803. (3 Littell's Laws, p. 159.)

"An act to incorporate the Ohio Canal Company," approved December 19, 1804 (3 Littell's Laws, p. 232), by section 20 authorizes a lottery, and by section 21 directs execution of bond to the State of Kentucky, and section 22 requires the directors to qualify before a justice of the peace. By an act amending the act incorporating the Ohio Canal Company, approved December 20, 1805, by section 17 the United States and the States of Pennsylvania, Virginia, Maryland, Ohio, and New York were authorized to subscribe for shares of the capital stock in this corporation, not to exceed the amounts therein named, and by section 24 the

corporation was authorized to propose any scheme or schemes of a lottery, &c. (3 Littell's Laws, p. 270.)

4th Littell's Laws.

"An act authorizing a lottery for the improvement of the navigation of the Kentucky river," approved January 10, 1811 (4 Littell's Laws, p. 210; supplemental act thereto, approved January 26, 1811, 4 Littell's Laws, p. 243; amendatory act thereto, approved January 1, 1812, 4 Littell's Laws, p. 318); and by a subsequent act the time for drawing lottery was extended January 8, 1816. (5 Littell's Laws, p. 12.)

"An act further to promote the navigation of Salt river and its navigable branches," approved January 29, 1811. (4 Littell's Laws, p. 249.)

"An act authorizing a lottery to improve the Limestone road from Maysville to the south end of Washington, in Mason county," approved December 31, 1811. (4 Littell's Laws, p. 279.)

"An act concerning the Lexington Library Company, to raise by lottery, in one or more classes, any sum of money not exceeding $3,000."

"An act authorizing a lottery for the building of a bridge over South fork of Licking, in Harrison county," approved January 31, 1811. (4 Littell's Laws, p. 282.)

5th Littell's Laws.

"An act for the benefit of the Grand Lodge of Kentucky," approved January 27, 1815 (5 Littell's Laws, p. 181). This act authorizes the Grand Lodge to operate a lottery for its benefit or to sell one or more classes, &c.

"An act allowing further time for improving the navigation of Kentucky river," approved January 8, 1813. The time in which to operate the lottery was extended to January 8, 1816. (5 Littell's Laws, p. 12.)

"An act concerning the seminary of Warren county and authorizing a lottery for the benefit of said institution," approved February 1, 1813. (5 Littell's Laws, p. 46.)

"An act to amend the laws establishing the Bourbon and Lebanon Academies," approved January 29, 1816 (5 Littell's Laws, pp. 322 and 323). By section 4 of this act a lottery is authorized to be operated for the benefit of the Bourbon Academy.

"An act for the benefit of the Russellville and Columbia Lodges," approved January 29, 1816 (5 Littell's Laws, p. 224). This act authorizes lotteries for the benefit of both lodges.

Georgetown was authorized to raise money by way of a lottery to purchase a fire-engine by "An act to increase the power of the trustees of the town of Georgetown, and for other purposes," approved February 10, 1816. (5 Littell's Laws, p. 400.)

"An act to prevent imposition by way of lottery in this Commonwealth," approved January 29, 1816. (5 Littell's Laws, p. 317).

"An act to amend the laws regulating the towns of Millersburg, Paris, and Bardstown, and for other purposes," approved February 4, 1817, by the 5th section thereof authorizes lotteries. (5 Littell's Laws, p. 570.)

"An act authorizing lotteries for purposes therein named," approved January 31, 1816 (5 Littell's Laws, p. 232), which authorizes lotteries for paving the streets of Danville, Richmond, Greensburg, Bardstown, and Cynthiana and for finishing the seminary at Shelbyville.

Session Acts of 1818.

An act authorizing certain lotteries, approved January 28, 1818. (Session Acts 1818, page 332.)

This act authorizes a lottery in one or more classes in Hopkinsville.

By the 3d section it authorizes the building of a church in Scott county by the operation of a lottery in one or more classes.

By the 5th section it authorizes the town of Richmond to draw a lottery in one or more classes and with the proceeds pave the streets of that town.

By the 7th section it authorizes the drawing of a lottery in one or more classes in the city of Louisville for the purpose of building a hospital.

By the 10th section it authorizes the trustees therein named to conduct a lottery in one or more classes in the town of Maysville and with the proceeds arising therefrom to build a bridge over Limestone creek.

By the 11th section it authorizes the commissioners therein named to draw a lottery in one or more classes for the purpose of paving the streets in the town of Paris.

By the 13th section it authorizes the commissioners therein named to raise by way of lottery in one or more classes a sum of money to purchase two acres of ground and to erect the necessary building for a public school thereon.

By the 17th section it authorizes the commissioners therein named to draw a lottery in one or more classes, and with the proceeds derived therefrom to improve the streets in the town of Winchester.

By the 19th section it authorizes the commissioners named therein to raise by way of lottery in one or more classes a given sum of money to improve the public square and the cross-streets in the town of Lancaster.

By the 21st section it authorizes the trustees of the Nicholas Seminary to raise by way of lottery in one or more classes a given sum of money for the completion of their school building, and also for the purpose of providing books, school apparatus, &c.

By the 26th section the commissioners therein named are authorized to raise a given sum of money by drawing a

lottery in one or more classes to build a school-house in the town of Barbourville.

By the 25th section the trustees of the Henderson Academy are authorized to raise by way of lottery in one or more classes a given sum of money, which, at their discretion, may be invested in bank stock or otherwise for the use and benefit of said academy.

By the 30th section the trustees of the Shelby Academy are authorized to raise by way of lottery in one or more classes a given sum of money for the use and benefit of said academy.

By the 31st section the trustees of the Newport Academy are authorized to raise a given sum of money by way of lottery in one or more classes, and which, when raised, shall be applied to the use of said academy as the trustees deem proper.

By the 32d section the trustees of the Woodford Academy are authorized to raise by way of lottery in one or more classes a given sum for the use of said academy as the trustees thereof shall direct.

By the 33d section the trustees of the Harrodsburg Academy are authorized to raise by lottery in one or more classes a given sum of money to be applied to the use of said academy as the trustees thereof shall direct.

By the 35th section the commissioners therein named are authorized to raise by way of a lottery in one or more classes a given sum of money for the improvement of streets in the town of Falmouth.

By the 36th section the commissioners therein named are authorized to raise by way of lottery in one or more classes a given sum of money, one-half of which is to be applied by the trustees of the town of Glasgow in draining the ponds and improving the streets in said town and the balance to be paid over to the trustees of Glasgow Seminary for its use and benefit.

By the 37th section the trustees of the Boone Academy

are authorized to raise by way of lottery in one or more classes a given sum of money to be applied to the use and benefit of said academy as the trustees thereof shall direct.

By the 38th section the trustees of the Hardin Academy are authorized to raise by way of lottery in one or more classes a given sum of money to be applied to the use of said academy as the trustees thereof shall direct.

An act authorizing a lottery in the town of Hardinsburg, approved January 30, 1818 (Session Acts of 1818, p. 416), authorizes the persons therein named within five years to raise by way of lottery in one or more classes a given sum of money to be expended in building a seminary in the town of Hardinsburg, in Breckenridge county.

An act authorizing lotteries in Nicholasville and Lexington, approved February 4, 1818 (Session Acts of 1818, p. 556), authorizes the persons therein named to raise by way of lottery in one or more classes a given sum of money to be applied in paving the streets of Nicholasville, in Jessamine county, and by the 3d section of this act the persons therein named are authorized to raise by way of lottery in one or more classes a given sum of money to be applied to the benefit and use of the Lexington Athenæum.

Session Acts of 1820.

An act supplemental to an act entitled "An act for the benefit of the Grand Lodge of Kentucky," approved November 27, 1820 (Session Acts of 1820, p. 52), authorizes the managers therein named to raise by way of lottery in one or more classes a given sum to be appropriated for erecting and furnishing the Grand Masonic Lodge for the benefit of the Grand Lodge of Kentucky.

Session Acts of 1822.

An act authorizing a lottery for the benefit of the Lexington Light Artillery Company, approved November 15, 1822

(Session Acts of 1822, p. 50), authorizes the persons therein named to raise by way of lottery a given sum of money to pay the indebtedness of the Lexington Light Artillery.

An act authorizing a lottery for the benefit of Paris Union Lodge, No. 16, and for other purposes, approved December 2, 1822 (Session Acts of 1822, p. 90), authorizes Robert Trimble and his associates to raise by way of lottery in one or more classes a given sum of money to be appropriated in the erection of a Masonic hall in the town of Paris for the use and benefit of Paris Union Lodge, No. 16.

By the 5th section of this act the persons therein named are authorized to raise by lottery in one or more classes a given sum of money to be appropriated for the purpose of erecting a Masonic hall in the town of Mt. Sterling for the use of said lodge.

By the 9th section of this act the persons therein named are authorized to raise by lottery in one or more classes a given sum of money for the purpose of opening and improving the road from Olympian Springs to Beaver Creek iron works, in Bath county.

By the 11th section of this act the persons therein named are authorized to raise a given sum of money for Franklin Lodge, No. 28, and Warren Lodge, No. 53, for the purpose of purchasing a lot or lots of ground, not exceeding two acres each, and erecting thereon suitable buildings for the benefit of said lodges.

An act authorizing a lottery for the purpose of erecting a house in Lexington for the use of the Medical School, approved December 7, 1822 (Session Acts of 1822, p. 149), authorizes the persons therein named to raise by way of lottery in one or more classes a given sum of money to be appropriated in the erection of a medical college in the town of Lexington for the use and benefit of the professors of the Medical Department of the Transylvania University.

An act to authorize a lottery for the purpose of draining the ponds in the town of Louisville and adjoining thereto,

approved December 7, 1822 (Session Acts of 1822, p. 181), authorizes the persons therein named to raise by way of lottery in one or more classes a given sum of money to be expended in draining and causing to be drained all the ponds of stagnant water in the town of Louisville and for the draining of all those ponds of stagnant water which are situated between Louisville and the river on the west and between Louisville and the mouth of Salt river on the southwest, &c.

Session Acts of 1824.

An act to amend an act authorizing a lottery for opening a road from Beaver Creek iron works to Prestonburg, and for other purposes.

By the 1st and 2d sections of this act the persons therein named are authorized to conduct a lottery in one or more classes and raise a sum of money authorized under the act of 1822, and the money to be applied to the construction of the Beaver Creek Iron Works road, to open the road from Beaver Creek iron works, in Bath county, to Prestonburg, in Floyd county.

By sections 3, 4, 5, and 6 the persons therein named are authorized to conduct a lottery in one or more classes and to pay the proceeds of money arising therefrom to the treasurer of Christian county.

Session Acts of 1828.

An act more effectually to guard the right of suffrage, and for other purposes, approved February 13, 1828 (Session Acts of 1828, p. 194). By the 7th section of this act any and all persons are forbidden to sell lottery tickets in this State, in any lottery drawn outside of the State, under the penalty of one thousand dollars for every such offense.

This penal section was to protect tickets sold and offered for sale in the many lotteries authorized by the General Assembly of Kentucky.

Session Acts of 1834.

An act for the benefit of the Grand Lodge of Kentucky, approved February 7, 1834 (Session Acts of 1834, p. 414). This act is for the benefit of the Grand Lodge of Kentucky in the operation of a lottery theretofore granted by the General Assembly of Kentucky.

Session Acts of 1836.

An act concerning the Grand Lodge of Kentucky, approved February 29, 1836 (Session Acts of 1836, p. 588). This act authorizes the Grand Lodge of Kentucky or the managers heretofore appointed or which they may from time to time appoint to sell or dispose of the whole scheme of said lottery or any part or class thereof upon such terms as may be agreed upon by said Grand Lodge or her managers.

Session Acts of 1837.

An act for the benefit of Shelby College, approved February 16, 1837. (Session Acts of 1837, pp. 219–220.)

This act authorizes the managers therein named to raise by way of lottery in one or more classes an amount, not exceeding the sum of one hundred thousand dollars, to be appropriated for the use and benefit of Shelby College. By the 3d section of this act the managers are authorized to sell and dispose of the whole scheme or any class or classes of said lottery to any person or persons who will enter into a bond, with good security, conditioned well and faithfully to comply with all the terms and conditions of this act, payable to the Commonwealth of Kentucky, &c.

Session Acts of 1838.

An act for the benefit of the city school of the town of Frankfort, and for other purposes, approved February 1, 1838. (Session Acts of 1838, pp. 126–128.)

"Whereas, it is represented to the present General Assembly, that it is the desire and intention of a number of individuals to establish a public school suited to the wants and conditions of all classes of the community in the town of Frankfort: and, whereas, the Franklin Seminary has been pulled down and removed from the public square, thereby depriving the citizens of the only house of public instruction in said town, as well as the entire loss of the proceeds of six thousand acres of land, granted by the legislature to the county of Franklin, for seminary purposes: and, whereas, it is a matter of great importance to the public, that the town of Frankfort should be well supplied with water, as well for private as for public uses, and it is represented to the General Assembly that the same can be done by conveying it from Cold spring, in the neighborhood of said town: and, that the security of the private and public buildings thereof would be greatly protected."

This act authorizes the town to raise $100,000 by lottery for the benefit of the schools and to procure water.

Session Acts of 1839.

"An act authorizing a fund to be raised by lottery for the endowment of a male and female academy in the town of Paducah, and for other purposes," approved February 8, 1839. (Acts of General Assembly of 1839, pp. 139, 140.)

This act was amended by an act entitled "An act for the benefit of the male and female academies of the town (now city) of Paducah," approved February 9, 1866. (Acts of General Assembly of 1866, p. 397.)

Acts of 1839.

An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes, approved February 16, 1839.

By the 26th section of this act (page 191, Session Acts of 1839) it is provided as follows:

"The 4th section of an act entitled, 'An act for the benefit of the city school in the town of Frankfort and for other purposes,' approved February 1, 1838, is hereby repealed, and it is hereby further enacted, that the managers referred to in said act, or their successors, shall be, and are hereby, authorized to sell and dispose of the scheme, or any class or classes of the lottery referred to in said act, to any person or persons who shall enter into bond, with good security, to the Commonwealth of Kentucky, well and faithfully to comply with all the terms and provisions of said act thus amended, which bond shall be received by said managers, and be, by them, filed in the clerk's office of the Franklin county court, before said lottery, or any classes thereof shall be drawn; and if said bond and security is approved, and declared to be sufficient by the said county court, and also, by the board of trustees of the town of Frankfort, then, and in such case, the managers shall not be individually responsible for any prize or prizes that may be drawn."

Session Acts of 1841.

"An act to incorporate the Grand Lodge of Kentucky," approved January 29, 1841. (Session Acts of 1841, pp. 156 and 157.)

By the 5th section of this act the Grand Lodge is authorized to divert any portion it may deem right of the money which it is authorized by law to raise for the erection of its Grand Lodge for the purpose of purchasing the necessary site for an asylum and putting the same into operation, &c.

Session Acts of 1849.

An act to amend the laws relating to the town of Frankfort, approved February 21, 1849. (Session Acts of 1849, pp. 215–217.)

By the 1st section of this act the act entitled "An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes," approved February 16, 1839, is amended as follows:

"1st. The said town of Frankfort shall hereafter be known as the city of Frankfort.

"2d. The certain trustees authorized by said act to be elected annually, shall hereafter be called and known as councilmen, &c.

"3d. The chairman of the board of trustees shall hereafter be known as mayor of the city of Frankfort."

Session Acts of 1850.

"An act for the benefit of Henry Academy and Henry Female College," approved December 9, 1850. (Session Acts of 1850, p. 33.)

By the preamble of this act it is stated that the trustees of Henry Academy and Henry Female College are now making application to this legislature to grant them jointly the privilege of a lottery, by which they hope to realize a sufficient amount of money to finish and furnish the school-houses and properly improve and cultivate the grounds and furnish the schools with suitable apparatus, libraries, &c.

By the 1st section of the act J. N. Webb, Thomas B. Posey, Joseph Drain, William Pryor, and C. M. Matthews are authorized to raise, by way of a lottery in one or more classes, the sum of fifty thousand dollars.

By the 3d section of this act the said managers are authorized to sell and dispose of the lottery scheme or any class or classes thereof to any person who shall enter into

bond, with good security, conditioned well and faithfully to comply with all the terms and conditions of the act, payable to the Commonwealth of Kentucky, &c.

Acts of 1861,

Passed at the called session, which was begun and held in the city of Frankfort on Monday, the 6th day of May, 1861, and ended on Friday, the 24th day of May, 1861.

An act in relation to the town of Frankfort, approved May 21, 1861 (Session Acts of 1861, p. 33):

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SEC. 1. That so much of the 26th section of an act entitled 'An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes,' approved February 16th, 1839, as have been repealed by any subsequent act or acts of the General Assembly of this Commonwealth, shall be, and the same is hereby, re-enacted, and all subsequent acts repealing the same, are hereby repealed.

"SEC. 2. This act shall take effect from its passage."

Session Acts of 1865–'6.

"An act to incorporate the Southern Mining, Manufacturing and Trading Company," approved February 8, 1866. (Session Acts of 1865–'6, p. 386.)

Session Acts of 1867–'8.

"An act for the benefit of Wm. McClaire, of Henderson, county," approved February 5, 1868. (Session Acts of 1867–'8, vol. I, p. 434.)

Session Acts of 1867–'8.

"The act amending the charter," approved February 20, 1868 (Session Acts of 1867–'8, vol. I, p. 604). The 2d section confers a lottery grant, and was so construed by the Jefferson circuit court in 1879.

In this amendatory act the name of the corporation was changed to that of the "Kentucky Law Company."

There is an additional amendment to the charter, which enlarges the lottery grant, which was approved February 20, 1874. (Session Acts of 1873–'4.)

Session Acts of 1871.

"An act incorporating public library." (Vol. II, Acts of 1871, p. 499.)

Session Acts of 1872.

An act amendatory of the laws in relation to the city of Frankfort, approved March 28, 1872. (Session Acts of 1871–'2, vol. II, p. 393.)

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SEC. 1. That the board of councilmen of the city of Frankfort be, and they are hereby, authorized and empowered to grant, bargain, sell and convey, to rent or lease, any and all property, or any part thereof, belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises, or immunities, on such terms, and for such sums, and at such times, as said board of councilmen shall deem for the best interests of the said city of Frankfort.

"SEC. 2. This act repeals all laws or parts of laws in conflict therewith, and shall have full force and effect from and after its passage."

Session Acts of 1876.

Resolution in regard to lottery, approved March 9, 1876 (Acts of 1876, vol. I, pp. 158–'9):

"Whereas, on the 21st day of January, 1874, the attorney general of this State, in response to a resolution of the senate, reported that certain lottery privileges had expired:

Now, therefore, be it resolved by the General Assembly of the Commonwealth of Kentucky:

That the attorney general of the State be, and he is hereby, directed to institute proceedings in the Franklin circuit court against such persons or companies or associations as hold or exercise or claim such privileges, as well as for any other lottery privileges which have expired, to have the same declared to be expired and no longer of any force or effect, and to cause to be punished by proper proceedings in the proper court.

Therefore, be it resolved, That the attorney general of this Commonwealth be requested to furnish this General Assembly at his earliest convenience with such information as he may have in regard to the lotteries of this Commonwealth, showing—

First. The number of lottery grants or charters that have been granted by the legislature of Kentucky since 1870 that now claim to act by authority of law.

Second. When were these grants or charters passed by the legislature under which these called the Paducah lottery and the Frankfort lottery or any other lottery claim to act, being operated within this Commonwealth?

Third. What were the terms and conditions upon which the legislature made the grants, franchises, &c., to the incorporations therein named or designated?

Fourth. How long have these grants, franchises, and privileges to run before they will expire or exhaust themselves by the terms of the grants therein contained?

Fifth. To state what legislation in his opinion is necessary to require said lottery companies to report to the governor of this Commonwealth annually, showing their operations under said grants, whether the same are exhausted, and if not exhausted, when they will terminate and expire." Approved March 9, 1876.

Session Acts of 1877–'78.

"An act to incorporate the Newport Printing and Newspaper Company," approved April 9, 1878. (Acts of 1877–'78.)

Session Acts of 1880.

"An act for the benefit of W. C. D. Whipps," approved April 27, 1880. (See opinion, 80 Ky., 270.)